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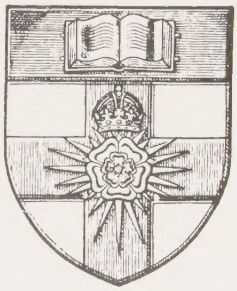

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THE

CRIMINAL APPEAL REPORTS

WITH

SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED

NOVEMBER 16, 1942, TO FEBRUARY 14, 1944

EDITED BY

T. R. FITZWALTER BUTLER,

OF THE INNER TEMPLE AND MIDLAND CIRCUIT, BARRISTER-AT-LAW

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE TUCKER.

REGINALD FREDERICK SAVORY.

1942.
16 *November*.

Sexual Offence — Child — No Corroboration — Summing-up — No Adequate Reference to Necessity for Corroboration—Cross-Examination of Witness for Defence on Previous Complaint which was not Proceeded with—Conviction Quashed.

The appellant was charged with indecent assault on two young girls. The evidence of the girls was uncorroborated, but the only reference to corroboration in the summing-up was the statement: "In cases such as these, of course you always labour under the difficulty of obtaining corroborative evidence." Further, a witness called for the defence was cross-examined with regard to a complaint that on a previous occasion the appellant had indecently exposed himself. No proceedings had ever been brought in respect of that complaint.

Held, that the conviction must be quashed on the grounds that (i) there was no corroboration of the girls' evidence and no reference had been made in the summing-up to the desirability of corroboration; and (ii) the cross-examination of the appellant offended against the rule laid down by the House of Lords in MAXWELL *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 24 Cr. App. R. 152; [1935] A. C. 309.

Appeal against conviction and sentence.

The appellant was convicted at Norfolk Quarter Sessions on October 7, 1942, of indecent assault on two young girls and was sentenced by the Chairman to six months' imprisonment.

The two girls, who were aged respectively nine and ten, stated that they had been indecently assaulted at Cromer Railway Station by a man whom they said was the appellant, who was an employee at that station. There was

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no corroboration of their evidence. The appellant gave evidence and put his character in issue, calling as a witness the stationmaster, under whose immediate supervision he worked. That witness was cross-examined on a complaint alleging that the appellant had some time previously indecently exposed himself. No proceedings were taken in respect of that complaint. The details of the cross-examination appear in the judgment.

G. R. Rougier, for the appellant:

The evidence of the girls was uncorroborated and there was no reference in the summing-up to the danger of convicting without corroboration. It has been the practice of the Court to quash a conviction in such circumstances. [He referred to WINFIELD (1939), 27 Cr. App. R. 139.] Further, the cross-examination of the stationmaster on a previous complaint against the appellant which had never been proceeded with was irregular, and offended against the decision of the House of Lords in MAXWELL *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 24 Cr. App. R. 152; [1935] A. C. 309.

F. T. Alpe, for the Crown.

HUMPHREYS, J.: The first point argued by Mr. Rougier was that there was no corroboration of the evidence of the two children and that there was no reference in the summing-up to the question of corroboration, beyond a mere statement that this was one of the cases which were difficult for juries. The words which he used were: "In cases such as these, of course you always labour under the difficulty of obtaining corroborative evidence." Mr. Alpe has suggested, rather faintly, that there may have been corroboration. In our opinion, there was none, and Mr. Alpe, who prosecuted at the trial, then agreed that it was at least possible that there was no corroboration, and, in answer to a submission by counsel for the defence, did not point to any suggested corroboration. The case, therefore, being one in which there was no corroboration,

the rule, which has been stated over and over again in this Court, as to the necessity of a reference being made in the summing-up to the desirability of corroboration, applies. One of the latest cases in which this Court has laid down that rule is one referred to by Mr. Rougier, WINFIELD (1939), 27 Cr. App. R. 139. In that case it was stated in the judgment of the Court (at pp. 141, 142): "This Court has said over and over again that the direction which must be given in such a case is a clear and plain direction on the desirability of corroboration" and "in cases of a sexual character it is eminently desirable that the evidence of a complainant should be strengthened by other evidence implicating the accused person in some material particular. It is true that there is nothing in law to prevent a jury from convicting on the uncorroborated evidence of such complainant, but it is the established rule of this Court that the presiding Judge must direct the jury in such a case on the desirability of there being corroboration of the complainant's evidence."

A further rule of this Court which emerges from other cases is that, in a case where there was sufficient and satisfactory corroboration, this Court will not interfere as a rule with the conviction, in spite of the fact that the presiding Judge failed to mention the question of corroboration. But where there is in fact no corroboration, and no reference has been made in the summing-up to the desirability of such evidence, then this Court will certainly, in most cases, quash the conviction.

Upon that ground we find it impossible to say that this conviction can be sustained, since it is plain that in the summing-up of the Chairman there was no reference, beyond the passing mention to which I have already referred, to the desirability of corroboration of the two small children, and in fact there was no such corroboration.

There is another point, which was not taken in the grounds of appeal, but which has been referred to by Mr. Rougier to-day, and in our view it relates to a matter which

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is equally important. The appellant is a man of good character, and he put his character in issue at the trial. He did so by calling as a witness Mr. Abel, the stationmaster at Cromer, under whose immediate supervision he was, and, in answer to the question: "What sort of character has he?", the witness said that the appellant was a very good workman indeed. That witness was cross-examined, first of all upon other evidence which he had given. Then this question was put by counsel for the prosecution: "My friend has asked you if this man had a good character. What sort of character do you give him? (*A.*) I said he was a very good workman. (*Q.*) What else? (*A.*) He does his work to my satisfaction. (*Q.*) Yes, what else? (*A.*) I do not know anything else. (*Q.*) Had you not better say? (*A.*) I can vouch for the man doing his work to my satisfaction." Then there is a rather cryptic observation by learned counsel: "My friend asked the question; it is my duty to put it." Counsel for the defence, then seeing what was going to be done, said: "I object to these questions." Then counsel for the prosecution said: "I do not want to be unfair, but I want to know what sort of a character he has. You say he had got a good character. Have you had complaints about him? (*A.*) Yes, I have. (*Q.*) About what? (*A.*) I had a complaint some while ago that he had indecently exposed himself." There it was left by counsel for the prosecution, as an answer to definite evidence of good character, that somebody had made a complaint about the man. Counsel for the defence, re-examining, said: "Do you now know that that complaint was shown to be quite untrue? (*A.*) No, I do not know. (*Q.*) It was dismissed as a case of mistaken identity? (*A.*) Not of mistaken identity. There was a doubt about it. (*Q.*) It was dismissed? (*A.*) It was brought to me. I investigated the case myself. (*Q.*) Was the defence put up mistaken identity? (*A.*) There was no identity. I dealt with the case, with the child's mother." It would seem, therefore, that some complaint was made, that it was investigated by the stationmaster, and

that it was in his opinion of such an unsatisfactory character for some reason or other that it was not necessary to go any further. It remains, therefore, not a case in which the appellant had been tried and acquitted, but in which nobody has ever put him on trial or given him an opportunity of answering such charge as was made against him.

It used to be thought in many quarters that, if a defendant in a criminal trial chose to put his character in issue, it was open to the prosecution to raise the issue and ask questions of the witnesses whether his general reputation was good or not. That was the view taken by this Court in MAXWELL, 24 Cr. App. R. 152; [1935] A. C. 309, a case which specifically raised that question. In that case there was an appeal against conviction on the ground that questions had been put to the accused man, who had put his character in issue, with regard to a previous acquittal upon a charge of the same character as that which was then being investigated, namely, a charge of procuring abortion. This Court held, both on the general common law principle of evidence and on the terms of the statute which allowed prisoners to give evidence, that such questions could be put. That case, however, went to the House of Lords, and the House differed from the decision of this Court. It is necessary to read only a short part of the headnote of the decision of their Lordships' House, as reported in the Criminal Appeal Reports: "As a general rule it is not permissible to cross-examine a prisoner who has put his character in issue on a previous charge which has resulted in an acquittal. In most cases the fact of such a charge having been made is irrelevant, in that it neither goes to show that the prisoner did the act of which he is being tried, nor does it go to his credibility." Applying that decision, which is binding on this Court, to the facts of this case, we need only say that the fact that some complaint was made against the appellant which went no further was irrelevant upon his trial for indecent assault, in that it neither tended to show that he was the person who committed the act, nor did it go to his

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credibility. Upon this ground also the conviction must be quashed.

The result, therefore, is that the appeal is allowed and the conviction quashed.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE TUCKER.

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JOHN RALPH FRIPP.
ANDREW JONES.

Character of Prisoner—Accidental Disclosure by Witness—Duty of Judge in Case of Undefended Prisoner—Prisoner Not Warned of his Right to Apply for Fresh Trial—Application of Proviso to Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 4 (1).

Where an irregularity takes place during the trial of an undefended prisoner, such as the accidental disclosure by a witness of a previous conviction of the prisoner or of the prisoner's bad character, it is the duty of the Judge to warn the prisoner that he has the right forthwith to make an application, if he so desires, for the discharge of the jury and the commencement of a fresh trial.

FEATHERSTONE (1942), 28 Cr. App. R. 176, followed.

Proviso to section 4 (1) of the Criminal Appeal Act, 1907, applied in a case where such an irregularity occurred and the Judge did not warn the prisoner of his right, on the ground that the evidence of the prisoner's guilt was overwhelming.

Appeal, in the case of Fripp, against conviction, and, in the case of Jones, against conviction and sentence.

The appellants were convicted at Yorkshire (North Riding) Quarter Sessions on October 1, 1942, of housebreaking and larceny, and were each sentenced by the Chairman to four years' penal servitude.

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The shadows of two men were seen coming from the house by a Miss Rowell, and a moment or two later she saw two men coming back on bicycles from the direction in which she thought that they had moved. They were then some ten yards away. She very positively in the witness-box identified those two men as the two appellants, though she had not previously attended any identification parade. She called out to a farmer, a Mr. Grainger, for help. The two men were chased, a policeman and two brothers named Smith joining in the chase. Eventually the two men were brought to bay in a wood. The evidence of the witnesses called for the prosecution was that there the two men first adopted a threatening attitude and then said that, if they had done damage, they were able to pay for it, immediately after which they ran off again and tried to board a lorry. A fight took place, in the course of which violent blows were struck. They then ran off again, pursued by the policeman, and were eventually captured by him. The appellants' evidence was a plain denial that they had broken into the house or stolen anything. They said that the first time that they were aware that they were being chased was when they got into the wood. Jones said that he was an absentee from the Army and that just before they went into the wood they saw a lorry, and he thought that he recognised some of the men on it, and that, believing that they might recognise him as an absentee, he ran off to the wood to hide himself. Fripp said that he knew that Jones was an absentee, and he himself had no reason for running away, but that he ran because Jones ran. He denied riding a bicycle at all.

W. Temple, for the appellants.
R. Lyons, for the Crown.

THE LORD CHIEF JUSTICE (after stating the facts): There was a very complete case of identification if the jury accepted the evidence for the prosecution. Unfortunately an incident

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occurred in the evidence of a police sergeant which requires the consideration of the Court. Jones, who was not defended by counsel, asked the witness in cross-examination: "(*Q.*) Was there or was there not another charge made against my friend and I? (*A.*) There was. (*Q.*) And were the witnesses called upon to identify my friend and I? (*A.*) Yes." (*Q.*) And because those witnesses failed to identify my friend and I, did the magistrates dismiss the charge? (*A.*) Yes." Unfortunately, in re-examination counsel for the prosecution asked the witness whether either of the men had any money on him. It was an irrelevant and unfortunate question, and it led to the police sergeant giving the answer: "They had property on them which they could not account for, and which was subsequently found to have been stolen in another case." Some questions were addressed to the police sergeant in the hope of clearing up the unfortunate impression which might have been made on the jury by that answer, and that was an end of the matter. No further reference was made to it by counsel who appeared for Fripp, and when the Chairman came to sum up he made no reference to it and that is all that there is to be said about that question and answer, except that the question was irrelevant and the answer was irregular. In such circumstances, if the matter had been thought by counsel to justify an application to the Judge to discharge the jury and commence the trial again, the application would probably have succeeded. No application was made by counsel who appeared for Fripp or by Jones, who was undefended.

This Court recently in FEATHERSTONE (1942), 28 Cr. App. R. 176, had occasion to make some observations on the proper course to be followed in the case of an undefended prisoner, where improper answers are given by witnesses with regard to the prisoner's previous convictions or matters of that sort. The observations were to the effect that it is the duty of the Judge to call the prisoner's attention to the fact that it is within his rights to make an application for the discharge of the jury and commencement of a fresh trial, just as it is within

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the rights of counsel to make such an application on behalf of a defended prisoner. There having been an irregularity of this sort, if this was a case where there was any real doubt as to the guilt of the persons charged, or if there was any possibility of the jury having come to any conclusion other than the conclusion to which they came if the irregularity had not taken place, these convictions would not be allowed to stand. It has, however, been submitted by counsel for the Crown that, the evidence in this case being overwhelming, the Court should apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, and, notwithstanding the irregularity, allow the convictions to stand. On the whole, we think that that submission should be accepted by the Court. The continuous evidence of the chase from the time when Miss Rowell identified the men to the time when they were in the wood, the attempt to escape in the lorry, the fight, the escape of the men twice after they had been caught, all lead to only one possible conclusion and that is that the appellants were completely and certainly identified as the men whom Miss Rowell had seen coming out of the house. The Court is properly slow to apply the proviso, but when the circumstances are such as to make it certain, in the opinion of the Court, that the verdict of the jury would have been the same if there had been no irregularity, it is the duty of the Court to do that which the Legislature intended, namely, not to allow what would amount to a miscarriage of justice merely because there was an irregularity. We think, therefore, that these convictions must stand. [His Lordship went on to say that, in the opinion of the Court, there was no ground for interfering with the sentence passed on Jones.]

Appeals dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE WROTTESLEY AND MR. JUSTICE TUCKER.

1942.
1 *December.*

MAUREEN PEARLE VAN PELZ.

Evidence—Character of Prisoner—Police Evidence after Conviction —Within What Limits to be Confined—Duty of Counsel for Prosecution.

A police officer called after conviction to give evidence of the character and antecedents of the prisoner should in general confine his evidence to the previous convictions (if any) and antecedents of the prisoner, including evidence of the prisoner's home and upbringing if his age makes this information material. He should also inform the Court of any matters (whether the subject of charges which are to be taken into consideration or not) which he believes are not disputed by the prisoner and ought to be known to the Court. He should, further, inform the Court of anything known in the prisoner's favour, such as periods of employment or good conduct.

Counsel for the prosecution should see that a police witness giving evidence after conviction is kept in hand and is not allowed to make allegations which are incapable of proof and which he has reason to think will be denied by the prisoner.

CAMPBELL (1911), 6 Cr. App. R. 131; [1911] W. N. 47; and BURTON (1941), 28 Cr. App. R. 89, referred to.

Application for leave to appeal against sentence.

The applicant was convicted at the Central Criminal Court on October 6, 1942, of larceny and was sentenced by the Recorder to fifteen months' imprisonment.

After the conviction of the applicant and before sentence a police officer gave evidence. He stated her age and the main details of her life for some ten or twelve years past. He then said: "For many years past this woman has led a loose and an immoral life, and she has associated constantly with convicted thieves in the West End of London. On her arrest she

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described herself as a property owner, but that is not the case." Then he went on to make some statements about the way in which she made profits out of dealing with property. He continued: "She is very well known indeed as a prostitute who frequents the West End of London with a view to contacting men with money, and her activities in this direction have exercised the mind of the police for a considerable time past. I have in my possession a letter which was written in April of this year to the Law Land Co., who are the owners of Harley House, and the writer alleges that shortly before writing this letter he met this woman at the May Fair Hotel, and after a number of drinks and entertaining her to dinner she suggested that he should return with her to her flat for drinks. He was there for two hours, during which time he says that he was under the impression a man was on the premises. Immediately after leaving he found that a sum of £60 was missing from his wallet. This woman is undoubtedly an adventuress. She is regarded as a very dangerous woman indeed. She is completely unscrupulous, and for many years past she has lived entirely on her wits." The Recorder, in passing sentence, stated that he was passing sentence on the assumption that the applicant was hitherto a woman of good character.

John Flowers, K.C., and *Derek Curtis-Bennett* for the applicant.

Vernon Gattie for the Crown.

THE LORD CHIEF JUSTICE: In our view, fifteen months' imprisonment was a very proper sentence in this case, and one with which it is impossible for us to interfere, but questions have been raised as to statements made by a police officer about the character and activities of the applicant. Mr. Gattie has submitted that the first part of the statement made by the police officer after the conviction of the applicant was unobjectionable, but he agrees that the latter part, particularly the sentences dealing with the alleged offence, and describing the

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applicant as a very dangerous woman, and so on, ought not to have been given by the police officer. If we had reason to believe that the Recorder sentenced the applicant on the basis that those statements were true, the Court would have had to consider whether the sentence should be reduced, but he himself says that he based the sentence on the assumption that she was a woman of good character. Therefore, the only question with which we must deal has regard to the propriety of police officers who are called in such circumstances making general statements about other offences and so forth.

The matter was recently before this Court in BURTON (1941), 28 Cr. App. R. 89, where Humphreys, J., in giving the judgment of the Court, referred to what he called some very improper evidence which a police officer employed by a railway company had given. The evidence was to this effect: "The police inquiries have proved definitely that the prisoner Burton has been responsible for the losses which have taken place owing to stealing on the railway." Humphreys, J. went on to say: "In our opinion, that was a most improper statement to make. Either the police could prove that statement, in which case they ought to have prosecuted the appellant, or at least have given him an opportunity of asking for those offences to be taken into consideration, or they could not, in which case they ought not to have invited the presiding Judge to increase the appellant's sentence in respect of felonies with which he had never been charged, and therefore had never had an opportunity of disproving." For many years past, the police have had the advantage of a judgment of Lord Alverstone, C.J., in CAMPBELL (1911), 6 Cr. App. R. 131, at p. 132; [1911] W. N. 47, where he said: "For many years it has been known that after the conviction of a prisoner it is the duty of some responsible officer of police to tell the Court what he knows about the prisoner as the result of inquiry, where it would involve great difficulty and expense to prove the facts by legal evidence. . . . At times, no doubt, police officers on these occasions say more than they ought to say

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against prisoners; but there is nothing to show that that occurred in this case."

The question which has exercised the minds of the Court is an important one. Police officers are nearly always called, after conviction, to assist the Court when it is considering the sentence to be passed on a convicted person. We think that in this case we should enlarge a little on what Lord Alverstone, C.J., said in CAMPBELL (*supra*) and what Humphreys, J., said in BURTON (*supra*). When a police officer is called to give evidence about a prisoner who has been convicted, he should in general limit himself to such matters as the previous convictions, if any, and the antecedents of the prisoner, including anything which has been ascertained about his home and upbringing in cases where the age of the prisoner makes this information material. It is the duty of the police officer, we think, to inform the Court also of any matters, whether or not the subject of charges which are to be taken into consideration, which he believes are not disputed by the prisoner and ought to be known by the Court. Police officers should inform the Court of anything in the prisoner's favour which is known to the police, such as periods of employment and good conduct. We have no reason to believe that this is contrary to the present practice of the police who constantly inform the Court of matters which are in the prisoner's favour. We also think that it is the duty of counsel for the prosecution to see that a police witness, when speaking on all these matters, is kept in hand, and is not allowed, much less invited, to make allegations which are incapable of proof and which he has reason to think will be denied by the prisoner.

It must not be taken that we are attempting to lay down a rule in such wide, and, at the same time, such exact, terms as would cover every case. That would be impossible, but it is hoped that these observations may be some guide to the right practice. The only other observation I need to make is that nothing I have said is intended to affect in the least degree the right of the Court to inquire into any matter

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on which the Court itself thinks it right to ask for information.

Applying these observations to the present case, it is the opinion of the Court that the police officer went further than he should. In the view, however, which we take as to the effect of these improper statements on the mind of the Recorder in passing the sentence, we do not think it right to interfere with it, and, therefore, the application for leave to appeal will be refused.

Application refused.

Solicitors: Philip Conway, Thomas & Co., for applicant.

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JAMES RANEY.

Murder—Summing-up—Omission by Judge of Material Part of Prisoner's Evidence—Conviction Quashed—Verdict of Manslaughter Substituted.

Conviction of murder quashed and verdict of manslaughter substituted in a case where the Judge, in reviewing the prisoner's evidence in his summing-up, had omitted to refer to a material portion of that evidence.

Appeal against conviction.

The appellant was convicted at Nottingham City Assizes on November 18, 1942, of the murder of John Flynn and was sentenced by Lawrence, J., to death.

On September 4, 1942, the appellant, who was a one-legged man and dependent upon two crutches, the deceased man

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Flynn, and a man named Lewis were drinking in the "Duke of Devonshire" public house, Nottingham. Some words passed between Flynn and the appellant, and Flynn knocked one of the crutches of the appellant from under his arm. The three men then went to another public house, the "Alfred the Great", about 100 yards away. About 9 p.m. Flynn made to leave those premises, followed by the appellant and Lewis. While Lewis was in a passage leading to the door attempting to sell a buttonhole, he suddenly heard Flynn say "He has stabbed me", and on looking round found that the appellant had disappeared through the door. Flynn was found to have been stabbed above the shoulder by a knife which had been in the appellant's possession at the time and which the appellant admitted having stolen from a grocer's shop earlier in the evening. Flynn died some ten days later.

When the appellant gave evidence on his own behalf at the trial, he said that when leaving the "Alfred the Great" he was about half a yard from Flynn. His evidence continued as follows: "(*Q.*) What did Flynn do? (*A.*) He knocked my crutch and knocked me off my balance and I turned round. (*Q.*) What happened then? (*A.*) He dived for his outside pocket. (*Q.*) With which hand? (*A.*) His right hand. (*Q.*) Did he put it in the pocket? (*A.*) Yes. (*Q.*) What did you do? (*A.*) Well, I expected a back-handed blow from John. I had the knife in my hand, in order to ward this blow off. I caught John. (*Q.*) What made you do that? What did you think when you saw his hand go into his pocket? (*A.*) That I was going to receive a back-handed blow because I was pivoting round. He had knocked me off my balance."

Dr. Norris, the Medical Officer of Lincoln Prison, where the appellant was detained in custody, was called by the prosecution at the request of the defence, and in cross-examination said that the appellant had an intolerance to alcohol, due to head injuries which he had received some years ago, and that such a man when under the influence of drink might suffer from delusions. When asked: "Whether he was

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threatened or not, might he honestly believe he was threatened?", the doctor replied: "He might quite honestly believe he was threatened."

T. Norman Winning, for the appellant:

The summing-up was defective in two respects. First, the Judge should have reminded the jury of the details of Dr. Norris's evidence, instead of merely saying, as he did, that the jury had heard that evidence and must give such effect to it as they thought proper. Secondly, when reviewing the appellant's evidence, the Judge omitted to refer to the appellant's statement that just before the fatal blow Flynn had knocked his crutch, which would be a serious act of provocation to a one-legged man.

T. R. Fitzwalter Butler, for the Crown (who was called on on this point only):

It is true that the Judge did not specifically refer to that statement by the appellant, but he put sufficiently before the jury the effect of the appellant's evidence as a whole. Moreover, the trial was a very short one and the whole of the evidence must have been fresh in the minds of the jury.

THE LORD CHIEF JUSTICE (after stating the facts): The argument on behalf of the appellant was in two parts. First, it was said that the learned Judge failed to deal sufficiently with the evidence which the doctor gave as to the intolerance to alcohol from which the appellant suffered. In the course of the submission which counsel for the appellant made on that point, he was not prepared to criticise the two passages in which the delusions of a man intolerant to alcohol were dealt with, but he contended that the passages were too brief and too summarised, and for that reason were inadequate. The view which we take concerning the summing-up on that matter is that, whatever criticism may be made of the passages in question, it is not possible for the appellant to complain of them. We express no opinion about one of the

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observations which the learned Judge made to the jury at the end of his summing-up, when he told them that they must consider what effect drink might have on the prisoner as affecting his own judgment about provocation or about the question whether his life was in danger. Without expressing any opinion whether that is open to criticism or not, it is sufficient to say that it affords no ground for any complaint by the appellant that the summing-up was not accurate or sufficiently favourable to him.

The other complaint relates to the manner in which the Judge referred to the evidence given by the appellant. He took the very proper course of repeating in some detail the evidence which the appellant had given. [After referring to this portion of the summing-up, his Lordship continued.] There is one omission on which counsel for the appellant has concentrated, and that is the omission of the appellant's evidence that Flynn knocked his crutch. Some point has been taken as to whether that was the same as saying that he knocked his crutch away, but at any rate it was a statement by the prisoner which it was for the jury to consider. To a one-legged man like the appellant, who is dependent on his crutches, it is obvious that a blow to a crutch, whether it is a blow that knocks the crutch away or not, is something very different from mere words. It seems to us that, if the Judge had repeated that part of the appellant's evidence, it would have been very proper to do so, because a blow to a one-legged man's crutch might well be regarded by a jury as an act of provocation. The Judge did not mention that particular piece of evidence, and on the whole we have thought it right, on the particular facts of this case, to accede to the submission that the omission of that piece of evidence, and the failure to call the jury's attention to the importance of it, renders it necessary that the conviction of murder should be quashed. This is a decision at which we have arrived after some consideration, and we have not overlooked the fact that the jury recommended the appellant to mercy.

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The relevance of that recommendation is that, if it had been brought to the jury's attention that, according to the prisoner, a blow had been struck immediately before he offered a blow, they might quite conceivably have come to a different decision.

We think that a conviction of manslaughter should be substituted for the verdict of the jury, and that the appellant should receive a sentence of five years' penal servitude for manslaughter.

Verdict and sentence substituted.

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HENRY LARKIN.

Summing-up—Murder—Direction that Verdict must be either Murder or Manslaughter—Proper in Some Circumstances—Unambiguous Verdict—Undesirability of Questions by Judge as to Meaning—Recommendation to Mercy—Undesirability of Reference by Judge to Right of Jury.

On a trial for murder, the undisputed facts were that the deceased woman had met her death as the result of her throat having been cut by a razor which belonged to the prisoner and was in the prisoner's hand when she received the cut. The prisoner's evidence was that he was flourishing the open razor for the purpose of frightening another person. The Judge directed the jury that there could not on the evidence be a verdict of acquittal, that the verdict must be one either of murder or manslaughter, and that even if they accepted the prisoner's evidence to the full, the verdict must be one of manslaughter.

Held, that, as on the prisoner's own evidence the woman had met her death as the result of an unlawful and dangerous act on his part, the direction was correct.

Where the verdict of a jury is entirely inconsistent, proper

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questions may be put by the Judge to invite the jury to explain what they mean, but where the verdict is plain and unambiguous, it is most undesirable that the Judge should ask the jury any further question about it.

It is very undesirable that a Judge trying a capital case should make any reference to the right of the jury to add a recommendation to mercy to their verdict.

Appeal against conviction and sentence.

The appellant was convicted at Liverpool Assizes on October 30, 1942, of manslaughter, and was sentenced by Oliver, J., to five years' penal servitude.

The following statement of facts is taken, in substance, from the judgment: On September 8, 1942, the appellant went to look for the deceased woman, with whom he had been living for some time. He wanted to see her for the perfectly proper purpose of getting from her some money, inasmuch as he was in the habit of giving her the whole of his wages, and if his work necessitated his going out to dinner and paying for it himself, he would go to her and get a shilling or two for his dinner. He found her at a drinking bout with two other women and a Belgian named Nielsen. Nielsen, who was by common consent at the trial treated as a worthless fellow, was a man of whom the appellant was rightly jealous, for he and the deceased woman had undoubtedly been engaged in committing what would have been adultery if the woman had been a married woman. Finding those persons together, the appellant was undoubtedly upset, and, after having a drink, went away. He went back to his own place, and there for a space of about half an hour—to quote his own words—brooded upon the matter. He came to the conclusion that Nielsen was treating him very badly and making a fool of him, and he decided to take his razor out of its case and put it in his pocket when he went off to seek either Nielsen or the deceased woman or both. He went to the place where he had left them, the basement of the house of a woman named Morgan. What happened exactly there

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was in very great doubt. No reliable witness was called to say what happened. Nielsen professed to have seen what happened, but the jury were directed to pay very little attention to his evidence, having regard to his character and the inconsistencies in his evidence. The only other person who gave evidence as to the actual occurrences was the appellant himself, who made a statement to the police, and gave evidence at the trial.

The case for the prosecution, resting largely upon the proved facts of the case and what was found afterwards, and partly upon the evidence, perhaps, of Nielsen, was that the appellant slashed the woman across the throat with the razor; that he then chased Nielsen down the stairs, and was heard to say "It is your turn next"; that he then went out into the street, and there saw a fellow-lodger, a man named Laverty, and told him in terms that he had caught his wife, as he called her, red-handed with the Belgian and had cut her throat. The police came and the appellant was arrested, and to the police he made a statement which was reduced into writing and signed by him. He said in that statement that he had taken the razor with him to scare the Belgian; that he had gone on tip-toe down the stairs; that he heard somebody, probably Mrs. Morgan, invite those two persons, the deceased and Nielsen, to go upstairs and use a bedroom and, to use his own expression, as they were going upstairs to the bedroom, he rushed in. He said that Nielsen fled downstairs again. The statement continued: "I said to Bessie, 'You are making a fool of me properly'. I pulled the razor out of my pocket and cut her throat. I ran out of the house and along the street after Nielsen, but I did not catch him."

At the trial the appellant gave evidence, and told a different story. He said that, having taken the razor for the purpose of frightening Nielsen, in the belief that by the show of the razor he would drive him away permanently, he heard Mrs. Morgan say: "Why don't you go up to Biddy's

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bed for an hour or so?" He said he waited in the lobby, and when he saw the deceased woman turn to go up to the bedroom he dashed in, snatching the razor from his pocket as soon as he saw Nielsen who, when he saw what he was doing, promptly bolted downstairs. He said that his only intention was to terrify Nielsen by the show of the razor. Then he added that the deceased woman, being "groggy" with drink, swayed against him when the razor was in his hand, and so it was that her throat was cut by accident. He also denied that he had made statements attributed to him by the police and by the witness Laverty, and said in his evidence: "I did not tell them I had cut her throat; I said her throat got cut."

After the jury had returned a verdict of guilty of manslaughter, Oliver, J., put certain questions to the foreman with regard to the meaning of their verdict. The questions and answers are set out fully in the judgment.

Rose Heilbron, for the appellant:

The Judge was wrong in withdrawing from the jury the possibility of a verdict of Not Guilty. Such a course is, in my experience, unprecedented. The jury might have said that they were not prepared to accept the evidence either for the prosecution or for the defence and that they were left in complete doubt as to what the true facts were; in such circumstances, a verdict of Not Guilty would have been proper. Even if the proposition of law that death resulting from a dangerous and unlawful act on the part of the prisoner must always amount, at the least, to manslaughter be correct, still the Judge should have left it to the jury to find whether the appellant's use of the razor did amount to an unlawful act or not. Further, there was no sufficient direction as to the burden of proof. Again, the Judge should not have excluded the evidence of Dr. Snell (the prison doctor) with regard to a statement made by the appellant. It was at least suggested by the Judge that the appellant was raising the defence of

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accident for the first time at the trial, and in such circumstances evidence of a prior statement made to the doctor on this matter was relevant. Lastly, the Judge misconstrued the verdict of the jury. The foreman had stated that the jury were satisfied that the deceased woman had met her death accidentally, and the Judge should have accepted this. The sentence was, in all the circumstances, too severe.

T. R. Fitzwalter Butler, for the Crown, was not called on to argue.

HUMPHREYS, J.: This is an appeal which is said to raise important questions of law. It is an appeal against a conviction for manslaughter. The appellant was indicted for the murder of a woman who passed as his wife and with whom he had been living for some ten years. The undisputed facts of the case were that that woman died as the result of her throat being cut with a razor, there being in her throat a deep wound which had severed the jugular vein on the left-hand side, a wound which stretched from underneath the ear to the middle line, and which caused her almost immediate death. It was admitted that, at the moment when that occurred, that razor was in the hand of the appellant, and that it was his razor.

The first ground of appeal urged was that the learned Judge was wrong in saying to the jury, as he did: "I tell you that upon the facts of this case there are only two verdicts, one of which you must return; one is a verdict of murder, the other is a verdict of manslaughter, and in this case I direct you as a matter of law you cannot return a verdict of not guilty." Whether that direction was right or wrong depends upon the facts of the case, and therefore, quite briefly, reference must be made to them.

[After referring to the facts as set out above, his Lordship continued:] It was upon that state of the evidence that the learned Judge told the jury in terms, quite deliberately and

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intentionally, that if they accepted the prisoner's story to the full, they must still find him guilty of manslaughter.

The ground of appeal alleges that the learned Judge misdirected the jury as to the law in so directing them, but in argument to-day Miss Heilbron has agreed that as a matter of law the learned Judge was right in saying—and I now refer to the language actually used by the learned Judge in the course of his summing-up—" A man who rushes into a house flourishing a naked razor and wounds someone, even accidentally, is still guilty of manslaughter if that person dies "; and a little later: " I have told you the law is for me, and I will tell you on my responsibility that in threatening a man with a naked razor because you wanted to scare him, however good reason you may have for disliking him, you are doing an unlawful act."

Perhaps it is as well once more to state the proposition of law which has been stated by Judges for generations and, so far as we are aware, never disputed or doubted. If a person is engaged in doing a lawful act, and in the course of doing that lawful act behaves so negligently as to cause the death of some other person, then it is for the jury to say, upon a consideration of the whole of the facts of the case, whether the negligence proved against the accused person amounts to manslaughter, and it is the duty of the presiding Judge to tell them that it will not amount to manslaughter unless the negligence is of a very high degree. The expression most commonly used is " unless it shows the accused person to have been reckless as to the consequences of the act ". That is the law where the act is lawful. Where the act which a person is engaged in performing is unlawful, then if at the same time it is a dangerous act, that is, an act which is likely to injure another person, and quite inadvertently the doer of the act causes the death of that other person by that act, then he is guilty of manslaughter. If, in doing that dangerous and unlawful act, he is doing an act which amounts to a felony, he is guilty of murder and he is equally guilty of murder if he

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does the act with the intention of causing grievous bodily harm to the person whom in fact he kills. That series of propositions of law is to be found in many old cases, and they are summed up quite accurately in the 30th edition of *Archbold's Criminal Pleading*, pp. 900 *et seq.*, where the authorities are given. It is not now contested that the learned Judge in those passages correctly stated the law. Miss Heilbron was quite right in drawing our attention to the fact that the learned Judge did give as an illustration of what would amount to manslaughter something which was certainly an unhappy illustration to choose. He did say this in terms: "The question is this: were you doing something unlawful with your motor car; were you driving it to the public danger? If you were, and you kill someone, you are guilty of manslaughter." That cannot be defended as a correct definition of manslaughter by negligence, because in driving a motor car a person is doing a lawful act. But, while we might have had to consider the accuracy or otherwise of that definition if the jury had in this case returned a verdict of murder, in point of fact the jury found manslaughter, and the only question, therefore, which arises here is not whether the reasons given by the learned Judge for his ruling were correct, but whether he was right in law in giving the direction to which I have referred, which, in our opinion, was a perfectly correct direction.

Miss Heilbron has, however, argued that, although the direction was, as an abstract statement of the law, correct, the learned Judge ought to have left it to the jury to say whether the act was lawful in this case or not. That, we think, is not so. Where facts are proved and accepted, then whether those facts amount to a crime or not must be a question of law, not of fact. Where the facts are in dispute, it is always for the jury to determine what are the true facts. They must have a direction on what their verdict must be if they accept one view of the facts, and what it must be if they accept the other view. But where the facts are proved in such a way that there can be no question about them, then it is

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perfectly right for the learned Judge to tell the jury: Those facts amount to a lawful or an unlawful act. In this case, in our opinion, it was perfectly right for the learned Judge not to leave to the jury any question of acquittal, but to tell the jury, as he did, on the facts of the case, that, accepting the evidence of the accused person to the full, it was not open to them to return a verdict of Not Guilty. Therefore, that point fails.

The next ground of appeal is this: "That the learned Judge omitted to direct the jury that the Crown must prove death as the result of a voluntary act of the prisoner and malice of the prisoner." The answer is that the learned Judge did so direct the jury.

The next ground is this: "That the learned Judge wrongly excluded the evidence of Dr. Snell, tendered by my counsel in order to rebut the inference raised by the learned Judge and by counsel for the Crown that I"—that is, the appellant—"raised the defence of accident for the first time at my trial, and that I failed to tell the authorities about it before." The answer to that point is that it is based upon a misconception. There is no passage in the shorthand note to which we have been referred which lends any colour at all to the suggestion that either counsel for the Crown or the learned Judge even discussed any inference that the defence of accident was raised for the first time at the trial. It is not contended by counsel for the appellant here that otherwise Dr. Snell's evidence could have been admissible, and it is only necessary to refer to a case in which a very similar suggestion was made. A very similar ground of appeal was raised before this Court in ROBERTS (1942), 28 Cr. App. R. 105. It is only necessary to refer to that case, without saying more about it, to show that Dr. Snell's evidence could not be, and was not, admissible, and therefore was rightly rejected by the learned Judge.

The last ground of appeal is: "That the learned Judge misconstrued the verdict of the jury in that he wrongly failed to accept the jury's statement that they had found that

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deceased had met her death accidentally." It is very difficult to understand what is being aimed at in that ground of appeal. Of course, if the verdict of the jury had been an inconsistent verdict, it could not stand, but the verdict of the jury was perfectly plain, unequivocal and unambiguous, and was accepted by everybody and recorded. That is shown from the reading of a few lines of the shorthand note. "(The Clerk.) Members of the jury, are you agreed upon your verdict? (The Foreman.) We are all agreed. (The Clerk.) Do you find Henry Larkin guilty or not guilty? (The Foreman.) We find him guilty of manslaughter. (The Clerk.) You find Henry Larkin is not guilty of murder but he is guilty of manslaughter, and that is the verdict of you all? (The Foreman.) That is the verdict of us all", and the verdict was then recorded. There was an end of the function of the jury, and it was then that the learned Judge, as he said a little later, for his own purposes, no doubt to assist him upon the question of sentence, asked the jury in effect what was the ground upon which they had reduced the crime from murder to manslaughter. It might have been on one of two grounds. This was a case in which it was alleged there was great provocation, and there was evidence of provocation, and no one could be surprised if the jury found a verdict of manslaughter upon the ground of provocation. The other ground might have been that the jury accepted the evidence of the appellant. The learned Judge had told them in terms that if they accepted that evidence, it would be right that they should find a verdict of manslaughter, because, on that view of the evidence, there was no deliberate voluntary act on his part, intending to do injury to anybody.

The learned Judge then said this to the foreman of the jury: "May I ask you this question: Did you come to the conclusion that this woman accidentally fell upon the razor?" In the opinion of this Court, that was a most undesirable question to put. To begin with, it was put to the foreman, and there was no indication from the learned Judge that he

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wished the jury as a body to answer the question. In fact it was answered by the foreman, apparently without consultation with his colleagues at all, and the answer was: "We did, Sir." Then the learned Judge said: "It was an accident? That was the reason? (The Foreman.) Yes, it was an accident. We have come to the conclusion that we can find no evidence to prove that it was murder." Then the learned Judge begins to explain: "It is not a question of murder. I said if it was done deliberately it was not murder if, in your view, there was provocation, and whether you thought it was provocation or whether you thought it was an accident the verdict would be manslaughter just the same. I do not know whether you did come to any conclusion about it or not, whether it was an accident or whether it was provocation. In either case your verdict is valid"—it is perfectly plain that nobody was suggesting that the verdict of the jury should be altered, or that they were being asked to return any verdict other than the one they had returned—"I want to know for my own purposes whether you did come to the conclusion that it was an accident or was provocation". Then the foreman said "Provocation". No better illustration could be found than the facts of this case of the undesirability of a learned Judge, having accepted in a criminal case what he regards as a perfectly proper verdict of a jury, then inviting the jury to explain what they mean by their verdict. As we in this country think, trial by jury is the best method yet devised for dealing with serious criminal cases, and a jury is the best possible tribunal to decide whether a man is guilty or not guilty and, if he is guilty, of what offence he is guilty, subject to the direction in law of the learned Judge. But no one has ever suggested that a jury is composed of persons who are likely to be able to give at a moment's notice a logical explanation of how and why they arrived at their verdict, and that really was what the learned Judge was inviting the jury to do. The unhappy result was that the foreman, no doubt thoroughly confused, gave two totally inconsistent answers.

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That incident cannot, in our opinion, be of any importance whatever from the point of view of this appeal against conviction. It was something which happened after the trial was over, so far as the jury were concerned, and if it has any effect at all, the effect must be upon the sentence. But it must be understood that this Court deprecates questions being put to a jury upon the meaning of the verdict which they have returned. If the verdict is absolutely inconsistent, proper questions may be put by a Judge to invite the jury to explain what they mean, but where a verdict has been returned which is perfectly plain and unambiguous, it is most undesirable that the jury should be asked any further questions about it at all.

There is, therefore, no ground for interfering with the conviction in this case, and it must stand.

There is also an appeal against sentence. Five years' penal servitude for manslaughter cannot, of itself, be regarded as an excessive sentence. In this case it was proved by the evidence of the appellant himself that he, brooding upon his wrongs, had taken his razor out of its case and put it in his pocket in order that he might terrify a human being by the showing of it. It is clear from his evidence, which is agreed with by Nielsen, that Nielsen did see him flourishing that razor, and was terrified, and ran away as the result of it. If a person acting in that way unlawfully does kill somebody, it cannot be regarded as other than a very serious case indeed. Whether the explanation of the verdict of the jury was that they regarded the woman's death as an accident, in the sense that she fell against the razor held in the appellant's hand while he was unlawfully flourishing it about, or whether the explanation was that he did cut the woman's throat, but did it under serious provocation, in our opinion the sentence of five years' penal servitude is not excessive, and the appeal against sentence is dismissed.

There is one other matter which I am asked by the other members of the Court, and I desire myself, to refer to in this

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case. In directing the jury on the difference between murder and manslaughter, the learned Judge said: "If the evidence in this case drives you to the conclusion that in law this was a murder—murder within the definition I have given you; a deliberate killing without sufficient excuse to reduce it to manslaughter—it is, as you know, within your province, if you so choose, to give a recommendation to mercy." Towards the end of the summing-up, he added this: "If you think this was a voluntary act and not an accident, was there enough provocation to reduce the thing to manslaughter, and if you think there was not, as I have already told you, you will have to return a verdict of murder, but you can say in the circumstances: 'We recommend him to mercy'." This is not a matter which, of course, can affect either an appeal against conviction or an appeal against sentence, but the members of this Court have given consideration to this matter, and I am asked to say, on behalf of all the members of the Court, that we strongly deprecate any reference by any Judge trying a capital case to the privilege of the jury in making a recommendation of any sort. A jury frequently ask the Judge whether they may add a rider to their verdict, and upon the Judge ascertaining that the rider is a proper one, leave is given. Where such a rider takes the form of a recommendation to mercy in a capital case, it may be of great assistance to the authorities, not the jury and not the Judge, but the authorities elsewhere who have the duty of advising His Majesty whether the sentence should be carried out or not. But if that recommendation to mercy comes not as the spontaneous act of the jury, who have heard all the facts, but because they are asked by the presiding Judge "Would you like to recommend this man to mercy?", it loses the whole of its force, and probably has no effect at all upon the mind of any person who is considering the case. It ceases to be the act of the jury, since it would be indeed a strange jury which, being asked in a murder case if they would like to return a verdict of guilty with a recommendation to mercy,

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refused to add those words which, after all, show the desire of every human being, that mercy should be shown.

There is another objection, and a great objection, to this practice, if it be a practice. It has always been impressed upon juries by Judges, in trying a capital case particularly, that they are not concerned with the consequences of their verdict. That has nothing to do with the matter so far as they are concerned, and Judges have always reprimanded counsel when counsel have referred to any such matter as a recommendation to mercy, as counsel sometimes do. But, if Judges are to make a practice of referring to the consequences of the verdict of guilty in a capital case, it is difficult to see why counsel for the defence should not have the same right, and if counsel for the defence, then counsel for the prosecution, and so a trial for murder might resolve itself into a very undignified and undesirable squabble as to whether, in the opinion of the jury, the capital sentence ought or ought not to be carried out. Those are some reasons why, in our opinion, the practice is a bad one, and this Court hopes that it will not be followed in future.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE ASQUITH.

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JOHN OLIVER HOBSON.

Sentence—Outstanding Offences—Sentence Beyond Maximum for Offence Named in Indictment.

Where outstanding offences are taken into consideration at the request of the prisoner the Court may not pass a sentence greater than the maximum sentence for the offence or offences named in the indictment.

TREMAYNE (1932), 23 Cr. App. R. 189, followed.

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Appeal against sentence.

The appellant pleaded guilty at Buckinghamshire Quarter Sessions, on June 29, 1942, to attempted housebreaking, and at his request two outstanding offences of housebreaking were taken into consideration. He was sentenced by the Chairman to three years' penal servitude.

John Maude, for the appellant:

The Chairman was not entitled to pass a sentence in excess of the maximum sentence for the offence named in the indictment. [He referred to TREMAYNE (1932), 23 Cr. App. R. 189, and was stopped.]

Elizabeth K. Lane, for the Crown:

It is submitted that the headnote in TREMAYNE (*supra*) is too wide. The case may have been decided on the basis that no real consent was given by the prisoner to the outstanding offences being taken into consideration. Here there is no ground for the suggestion that the appellant took the course of asking for the outstanding offences to be taken into consideration in the belief that he could not be sentenced to more than two years' imprisonment. If the argument for the appellant is right, whenever the Court considers that the suitable sentence for the offence for which the prisoner is indicted is the maximum allowed by law, the Court is precluded in effect from taking outstanding offences into consideration, and it would be necessary either that the prisoner should be separately indicted for the outstanding offences or else escape punishment for them altogether.

THE LORD CHIEF JUSTICE: The appellant pleaded guilty to attempting to break and enter a dwelling-house and gave his consent to two outstanding charges of housebreaking being taken into consideration. The learned Chairman, thereupon, instead of sentencing him to the maximum sentence for the offence to which he pleaded guilty, sentenced him to three years' penal servitude. That could be done only on the basis

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of the provisions of the Penal Servitude Act, 1926, but section 1 of the Act quite clearly limits its operation to offences of which a prisoner is convicted on indictment.

This case is another example of what happened in TREMAYNE (1932), 23 Cr. App. R. 189. We will take a course similar to the course which the Court took in that case, and substitute a sentence of imprisonment for two years for the sentence of three years' penal servitude. That sentence will run concurrently with a sentence of twelve months' imprisonment which the appellant is serving for another offence, and will be upon the footing that the two outstanding charges which the appellant wished to be taken into consideration have been dealt with according to his desire.

Sentence reduced.

BEFORE

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EDWARD JAMES COLLINS.

Extension of Time—Murder—Person under Eighteen—No Sentence of Death—Jurisdiction of Court—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 7 (1)—*Children and Young Persons Act*, 1933 (23 *Geo.* 5, *c.* 12), *s.* 53.

By section 7 (1) of the Criminal Appeal Act, 1907: " . . . . Except in the case of a conviction involving sentence of death, the time, within which notice of appeal or notice of an application for leave to appeal may be given, may be extended at any time by the Court of Criminal Appeal."

Where a person under eighteen years of age is convicted of murder, as the conviction, by reason of section 53 of the Children and Young Persons Act, 1933, does not now involve

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a sentence of death, the Court of Criminal Appeal has jurisdiction, if it thinks it proper to do so, to extend the time within which notice of application for leave to appeal against conviction must be given.

TWYNHAM (1920), 15 Cr. App. R. 38, referred to.

Application for extension of time within which to apply for leave to appeal against conviction and sentence.

The applicant was convicted at Leeds Assizes on November 27, 1942, at a time when he was under eighteen years of age, of murder, and was ordered by Hallett, J., to be detained until His Majesty's pleasure be known.

No counsel appeared on either side.

HUMPHREYS, J.: Section 7 (1) of the Criminal Appeal Act, 1907, provides that this Court may extend the time within which an applicant must apply for leave to appeal in any case except in the case of a conviction involving sentence of death. There is, therefore, in our judgment no reason in law why we should not extend the time in this case, if we think it right to do so, although the conviction was for murder, because the conviction in this case did not involve sentence of death. This matter arose as long ago as 1920, when a conviction of a person over sixteen years of age for murder did involve the passing of a sentence of death. The last passage of the judgment of the Lord Chief Justice (Lord Reading) in TWYNHAM (1920), 15 Cr. App. R. 38, at p. 39, requires a slight amendment in view of the alteration of the law since that date. It must now be taken to read as follows: "For the future, it must be taken as a direction of this Court that an application for an extension of time to apply for leave to appeal *against a conviction involving sentence of death*"—instead of, as now appears, "against a conviction of murder"—"cannot be received after the time fixed by the section has elapsed."

The applicant asks us to review the sentence which was passed on him, but that we have no power to do, because the

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sentence of detention until His Majesty's pleasure be known is one fixed by law in the case of a person under the age of eighteen who is convicted of murder, and we have no power to review any sentence which is fixed by law.

The applicant's ground for asking for extension of time within which to apply for leave to appeal against conviction is that he left the matter for his father to arrange with his solicitor. He was convicted of a most brutal murder on the clearest possible evidence, including his own statement. He went into a lock-up shop at Brighouse kept by Mary Ann Barlow, a woman fifty-seven years of age, to buy a tin of vaseline. He bought the tin and paid for it, and then, according to his own statement, produced an air-gun and presented it at her head, as he himself said, to frighten her. She was a courageous woman, and probably by reason of that fact lost her life, for she closed with the applicant and he then hit her on the head with the butt of the gun and kept on hitting her till he battered her head in and killed her. It would be ridiculous to pretend that there is any ground for interfering with the conviction.

The application, therefore, is refused.

Application refused.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE TUCKER.

FREDERICK .DAVIS.

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14 *January.*

Sentence—Outstanding Offences—Proper Procedure—Prisoner himself to be Asked if he Admits them and Desires them to be taken into Consideration.

Where the question of taking into consideration outstanding offences arises, the proper practice is that the prisoner himself (and not his counsel) should be asked by the Judge whether he admits them and desires that they should be taken into consideration.

Application for leave to appeal against sentence.

The applicant pleaded guilty at Hertfordshire Quarter Sessions on November 16, 1942, to obtaining money by false pretences, and at his request thirty-three outstanding offences were taken into consideration. He was sentenced by the Chairman to three years' penal servitude.

No counsel appeared on either side.

TUCKER, J.: With regard to the thirty-three outstanding offences being taken into consideration, what happened in the Court below was this. A police officer, who gave evidence of the prisoner's antecedent history, was asked by counsel for the prosecution: "First of all, are there thirty-three other offences which this man desires to have taken into consideration? (*A.*) Yes. (*Q.*) Has he been served with a list of those offences? (*A.*) A copy of this form, which I now hand to the Court, has been served upon the accused", and the form was thereupon handed in. At that stage counsel for the prisoner said to the learned Chairman: "I have seen the

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defendant about these outstanding offences. He has shown me the copy of the form containing those offences which has been served upon him, and he instructs me to say that he admits them all. He has read the list, and he desires them to be taken into consideration by the Court to-day." The learned Chairman then said: "Will that satisfy the Court of Criminal Appeal?", and counsel said, "Yes, in my submission, it will", and the Chairman said "Very well" The Court desires to say that it considers that the proper practice is for the prisoner himself, if he so desires, to admit the offences and ask that they should be taken into consideration, and in that respect we think that the doubts of the learned Chairman were correct and the assurance of counsel was wrong. But it does not follow, because a strict and accurate course was not taken, that in the circumstances of a particular case, where the Court is satisfied that the prisoner did admit the offences and desire them to be taken into consideration, the Court will interfere with the sentence. In this case not only did the appellant hear his counsel say in open Court what I have read, but he in fact in his own handwriting signed the list of the oustanding charges in these words: "I admit the above offences."

[His Lordship then referred to the facts of the case and said that, in the opinion of the Court, there was no ground for interfering with the sentence and that the application must be refused.]

Application refused.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE TUCKER.

BERNARD CONRAD BLOXHAM.

1943.
13 *January.*

Attempt to Commit Crime—Larceny—No Step by Prisoner Connected with Taking and Carrying Away — Conviction Quashed.

The appellant, who was an employee of a district council, took one L. to premises of the council where a refrigerator belonging to the council was kept. He there agreed to sell her the refrigerator for £30, and received from her a cheque for that amount. He told her that arrangements could be made later on for a van to be sent to the premises to collect the refrigerator and that he would arrange for a man to be at the premises when the van arrived to make certain adjustments and hand over the refrigerator. The appellant took no steps to implement his bargain and did not return L. her money. He was convicted of attempted larceny of the refrigerator.

Held, that as the appellant had taken no step either immediately or remotely connected with the taking and carrying away of the refrigerator, he could not be guilty of attempted larceny, and the conviction must be quashed.

EAGLETON (1855), 24 L. J. M. C. 158, and ROBINSON, 11 Cr. App. R. 124; [1915] 2 K. B. 342, applied.

Appeal against conviction.

The appellant was convicted at Middlesex Sessions on November 19, 1942, of attempted larceny, and was sentenced by the Deputy-Chairman to six months' imprisonment with hard labour.

H. J. Astell Burt, for the appellant:

There was here no act connected with the asportation of the refrigerator, nor any act sufficiently proximate to the crime, to constitute an attempt. What the appellant did was at most preparation for the crime, and a distinction between acts preparatory to the commission of a crime and

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an attempt to commit a crime has been clearly drawn in decided cases. [He referred to EAGLETON (1855), 24 L. J. M. C. 158, and ROBINSON, 11 Cr. App. R. 124; [1915] 2 K. B. 342.]

Frederick Levy, for the Crown:

The jury were entitled to regard the conduct of the appellant as sufficiently proximate to the larceny of the refrigerator to constitute the attempt.

TUCKER, J.: The appellant was convicted at Middlesex Sessions of attempting to steal a refrigerator.

The appellant had had experience in the catering trade, and was of previous good character. In June, 1941, he was appointed catering manager to the Enfield Urban District Council at a salary of £400 per annum, with certain war increases. In the course of his duties there he became aware of the fact that a certain Mrs. Lilley, who was employed by some grocers called Winstanley, was desirous of acquiring a refrigerator, and he knew that the council had a refrigerator at premises called Bury Farm. As his conduct subsequently showed, he was minded to dispose of this refrigerator, to obtain the price of it from Mrs. Lilley, and to put the proceeds into his pocket. Accordingly, he took Mrs. Lilley in July to see the refrigerator at Bury Farm, having arranged by telephone to meet her. He picked her up in one of the council's vans. They examined the refrigerator in the presence of another employee of the council. They then went back to the office, and she asked him what he wanted for it. He said that it had cost him £25 and he would take £30. She gave him a cheque for £30, and there the matter ended. Mrs. Lilley was away for some little while after that. She had been told that arrangements could be made later for a van to be sent for the refrigerator. The appellant had told her that he would have a man at the store to hand it over to her when the van called, and that it would be necessary for the gas man to be there to do something in connection with

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it. None of those things were done. She never got the refrigerator. She never got her money back, and no van ever called to attempt to pick it up.

It is said that those facts, which were undisputed, constitute an attempt by the appellant to steal the refrigerator, and our attention has been drawn to the well-known authorities on this matter. In ROBINSON, 11 Cr. App. R. 124, at p. 129; [1915] 2 K. B. 342, at p. 348, the Lord Chief Justice (Lord Reading) quotes the well-known statement by Baron Parke in EAGLETON (1855), 24 L. J. M. C., at p. 166, which is as follows: "The mere intention to commit a misdemeanour is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are". We do not think it is desirable or necessary to attempt in any way to elaborate that statement of what is necessary to constitute an attempt. It is common ground that in many cases the difficulty arises in the application of that principle to the particular facts, and it is very often very difficult to distinguish between acts which are merely remotely leading towards the commission of an offence and those which are to be considered as attempts to commit it, being acts immediately connected with it. In this case, we are of opinion that there is no difficulty whatever. The very essence of the offence of larceny is the asportation, and if the appellant had done anything which could amount to an attempt to take and carry away the refrigerator, he would of course have been guilty of the offence with which he was charged. But the fact is that he took no step whatever connected either immediately or remotely with taking and carrying away this refrigerator. What he had done, according to the evidence, appears to have been to obtain from Mrs. Lilley £30 by means of a false representation that he had authority to dispose of this refrigerator. Having once obtained that money,

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and having shown by that act that he was not an honest man, there was no reason why he should implement the bargain he had made with Mrs. Lilley by stealing the refrigerator and delivering it to her. He had got what he wanted, which was money, and he subsequently made no attempt whatever to implement the arrangement that he had made with her.

In these circumstances, although this case is completely lacking in merit, we are of opinion that it is quite clear that there was no evidence of any act which could be properly left to the jury as sufficient to constitute an attempt to steal, and the appeal must therefore be allowed and the conviction quashed.

Conviction quashed.

Solicitors : H. W. Pegden, for appellant; W. T. Ricketts & Son, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE TUCKER AND MR. JUSTICE CASSELS.

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RONALD ERNEST MEREDITH.
CHARLES BLUSTON.
HENRY BRAMLEY.

Summing-up—Joint Trial of Several Prisoners—Evidence by Prisoners on Oath—Direction Not to Regard Evidence of One Prisoner as Evidence Against Co-Prisoners.

Where several prisoners are tried jointly, and one or more of them gives evidence on oath, it may in some cases be desirable that the jury should be directed that, although the evidence given by one prisoner does in those circumstances strictly become evidence against his co-prisoners, they should not regard it as such, but should use that evidence only for the

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purpose of considering whether that individual prisoner has given an explanation which may be true, or whether his evidence compels the jury to disbelieve him.

Appeals against conviction.

The appellants were convicted at the Central Criminal Court on November 3, 1942, of receiving stolen property, and were sentenced by the Recorder, Meredith to eighteen months' imprisonment, and Bluston and Bramley each to twelve months' imprisonment.

Some time shortly before May 18 or 19, 1942, a quantity of linen was stolen from premises at Hendon. There was evidence that a man named Littman, who was convicted at the same time as the three appellants, engaged a lorry to go to Dulwich on May 22 and pick up some stuff which the lorry driver said in evidence he took to Bluston's upholstery works. Bluston's upholstery works were the headquarters of two companies, both of which were substantially the property of the appellants Bluston and Bramley. On those premises there was a room which was sub-let by them to the appellant Meredith. On the evening of the same day that the lorry driver took what he had picked up at Dulwich to Bluston's upholstery works, the police visited the premises and asked Bluston about some linen. Bluston said in effect that the linen was in Meredith's office, and that he knew nothing about it. That was an untrue statement by Bluston, on his own story. Meredith and Bramley were then found sorting the linen, the bulk of which was said to weigh two and a half tons, and taking details of the different classes of linen. Meredith was asked a question, and he then in his turn made a false statement. He said he had bought it from Rodberg, and Rodberg said it had come from Kerstein Mansions, some little distance away. The police at once corrected him, and said that that was not true and that the linen was stolen, whereupon Rodberg reconsidered and altered his statement. Bramley, in his turn, was asked what was his connection with the linen. He did not answer, but Meredith gave this answer

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in his presence and in his hearing: "Oh, he is only concerned with the factory upstairs; he is merely helping me". That statement was, in fact, false. All three appellants, therefore, when confronted by the police on the evening of May 22, when the linen was brought from the house at Dulwich to the works of the appellants Bluston and Bramley, at first blush made statements which were untrue, and which they afterwards all admitted to be untrue.

Later, Meredith and Rodberg were arrested; Bramley and Bluston were not arrested. Rodberg, after arrest and caution, made a statement which was almost entirely false, and a concoction from first to last. It was shown to Meredith, and the police officer who showed it to him cautioned him, whereupon Meredith said: "It is quite possible to buy a load of stuff like this anywhere; a merchant can only live if he knows where to go and buy. I did not ask him where he got it, because he would not have told me". That was a story quite different from the story afterwards told by Meredith when he in turn was arrested and cautioned, and made a statement. The police made further inquiries, as Littman all the time was denying any knowledge of the matter, and by June 6, the three appellants seem to have thought that it would be as well if they made statements. The statements contained a considerable amount of detail on immaterial matters, such as, for instance, as the description of two men who were picked up and went down to Dulwich, and so forth. The substance of the statements was that they thought that the goods were salvaged property, and had no idea whatever that they were stolen.

John Flowers, K.C., and *W. Fordham*, for the appellants.
John Maude, for the Crown.

THE LORD CHIEF JUSTICE: The substantial complaint which was made in this case against the learned Recorder's summing-up was that he did not tell the jury that they must take into consideration the appellants' statements,

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and must ask themselves whether they accepted them as truthful statements in each case, or at least must ask themselves whether, even though they did not fully accept the statements, they did not feel that there was a doubt raised by them in their minds, which should lead them to acquit the three defendants. The course which the learned Recorder took in his summing-up was not to read once more in full the statements which had been read in the course of the case for the prosecution. It was admitted by Mr. Flowers in his very able address on behalf of the appellants that there was a case to answer, but he contended that, although the learned Recorder put great emphasis on the case against the appellants, particularly fastening upon their false statements on May 22, he never fairly put to the jury their statements that they thought the goods were salvaged property.

In our judgment, it was the right course for the learned Recorder in his summing-up to deal with the evidence of the three defendants instead of treating the statements as their evidence. The statements were put in by the prosecution. Each statement was evidence only against the person who made it. It was not evidence against either of the other defendants, and if the learned Recorder had taken any other course than that which he did take, namely, to remind the jury of the evidence given by the defendants themselves, we think he would have been adopting a course which might have had unfortunate consequences. At the end of his summing-up, the learned Recorder said this: "These men all made statements, and it is impossible for you to listen to all those statements and not to realise that they are statements which may implicate some persons other than the men making them. You will do your best, members of the jury, to remember that those statements are only evidence against the persons who make them. I will go further than that. When the individual making a statement of that sort comes into the witness-box and gives evidence on oath, it is a different situation. What he says then does become evidence against the other person,

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but I endeavour in this class of case when there are a number of prisoners in the dock always to warn juries that so far as possible they should not use any evidence given by a person who is accused when he is in the witness-box against any one of his co-defendants. So far as his evidence is concerned, use it for the purpose of seeing whether he gives you an explanation which may be true or an explanation which leads you to disbelieve him and therefore to convict him, but try as far as possible not to use any one prisoner's evidence as evidence against one of his colleagues". In our judgment, that was a proper direction and one that was fair to each of the appellants.

Mr. Flowers indicated at one stage of his argument that a direction of the character which was held to be right in ABRAMOVITCH (1914), 11 Cr. App. R. 45, should have been given by the learned Recorder. He had, as a matter of fact, earlier in the direction which he gave to the jury, included a statement which we think would satisfy that contention. He had directed the jury that they must acquit the prisoners if there was any doubt left in their minds, and that they must take into consideration the statements made by the prisoners, which were fully in the minds of the jury when the learned Recorder was addressing them. We think, after consideration, and having heard counsel, that no criticism can properly be made of the learned Recorder's non-direction, as it is called, on this matter, and I observe that it does not appear as a criticism of the learned Recorder's summing-up in the grounds of appeal. The grounds of appeal as to non-direction are five in number, and not one of them contains the suggestion that the learned Recorder omitted to direct the jury as to their duty to acquit the prisoner in each case if there was a doubt left in their minds as the result of the statements which he had made either in the witness-box or to the police.

The question which the jury had to consider after hearing the evidence, including the statements, was whether or not each of the three defendants knew that the linen was stolen property. We have no doubt that the jury, especially after

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the passage which I read, which was at the very end of the learned Recorder's summing-up, had fully in mind that the story of the three men was that they were perfectly innocent in the matter, that they had been told that the property was salvaged property, and believed it was salvaged property, and the question for the jury was whether the facts on the other side did not convince them beyond a reasonable doubt that the defendants knew that it was stolen property.

[His Lordship dealt with five other grounds of alleged misdirection, and continued:] We are satisfied on the whole that neither on any of these five grounds, nor on the broad ground taken by Mr. Flowers that the jury were not given an opportunity of saying whether they accepted the statements of the defendants and that this vitiated the summing-up, can any criticism fairly be made. It is true that the summing-up as a whole leans, if that is the right expression, against the appellants. But a direction in a criminal Court cannot always maintain the precise balance which I suppose in theory people sometimes think a direction to a jury should preserve. It is within the experience of all of us that a learned Judge finds it necessary, because the facts compel him, to direct the jury in such a way as to indicate to them his opinion, having told them that they are judges of fact. It is impossible to quash a conviction because a summing-up is adverse to a particular defendant. The only question is whether the case for the defence was fairly put before the jury. In our judgment the substance of the appellants' case was put before the jury, and the jury, having heard the whole of the evidence, were in a position to come to a decision, which they did by convicting the defendants. After a full investigation of this matter, we think that these appeals should be dismissed.

Appeals dismissed.

Solicitors: Zeffert, Heard and Morley Lawson, for appellants.

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NOTE.

In GARLAND, November 4, 1941, Humphreys, J., in delivering the judgment of the Court (the Lord Chief Justice, Humphreys, J., and Lewis, J.), said: "The co-defendant of the appellant had given evidence before the jury on her own behalf, and what she said on that occasion was evidence for all purposes in the case, and in that sense evidence against the appellant . . . It is said that the evidence given by the co-defendant of the appellant was very detrimental to him, as no doubt it was. It is said that the learned Recorder [of London] omitted to remind the jury that in the position which she occupied in the case she ought to be treated as an accomplice, because her statement admitted to a great extent the case against her, and went on to state that she did what she did at the instance of the appellant. There is no doubt of the correctness of that proposition of law, and this Court will do nothing to weaken the force of those judgments in which it has been repeatedly said by this Court that it is most desirable that a Judge dealing with such a case, where it involves the evidence of an accomplice, should remind the jury of the danger of convicting upon the evidence of an accomplice unless corroborated". Reference was then made to DAVIES (1930), 22 Cr. App. R. 38, and LEWIS (1937), 26 Cr. App. R. 110. The judgment then proceeded: "Is the other evidence in this case, apart from that of the woman co-defendant of the appellant, clear and convincing to such an extent that this Court is satisfied that no miscarriage of justice has arisen by reason of the omission of the direction to the jury". Having reviewed the evidence, his Lordship concluded: "The evidence of corroboration was clear and convincing. We are satisfied that if there had been the direction to the jury on the subject of accomplices, which we regret was not given, it would have made no difference to the result of the case. On that ground we dismiss the appeal."

On this topic reference may usefully be made also to BARNES AND RICHARDS (1940) 27 Cr. App. R. 154.

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WILLIAM VERNON GUY EMERY.

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1 *February.*

Sentence—Borstal Detention—No Conviction by Court of Summary Jurisdiction—No Inquiry into Circumstances of Case at Quarter Sessions.

Sentence of detention in a Borstal institution quashed on the grounds (1) that there was no proper conviction by the Court of summary jurisdiction, and (2) that there had been no inquiry into the circumstances of the case at quarter sessions.

Appeal against sentence (on certificate).

The appellant appeared before a Court of summary jurisdiction at Brighton charged with malicious wounding. When called on to plead, he said: "Guilty, in self-defence". This was treated by the Court as a plea of guilty and he was committed to Brighton Quarter Sessions for sentence under section 10 of the Criminal Justice Administration Act, 1914. He appeared on December 29, 1942, before the Recorder, who at first held that he had no jurisdiction to deal with the case, but later, without any inquiry into the circumstances of the case, sentenced the appellant to detention in a Borstal institution for a period not exceeding three years, and gave a certificate for appeal under section 3 (b) of the Criminal Appeal Act, 1907.

E. M. Hoy, for the appellant:

The proceedings were entirely irregular. In the first place, the appellant's plea before the Court of summary jurisdiction amounted to a plea of not guilty, and the Court was wrong in treating it as a plea of guilty and in committing the appellant to Quarter Sessions without hearing evidence. Secondly, the Recorder should have declined jurisdiction, as he was at first

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minded to do, but in the result he passed sentence without making any inquiry into the circumstances of the case, which section 10 of the Criminal Justice Administration Act, 1914, renders imperative.

C. Harmsworth, for the Crown, did not seek to support the sentence.

CASSELS, J.: Every mistake that was open to be committed in this case seems to have been committed. The appellant first appeared before a Court of summary jurisdiction at Brighton upon a charge of malicious wounding. When called upon to plead, he said: "Guilty, in self-defence". In the ordinary way, that would have been taken as a plea of not guilty. It cannot be outside the experience of justices and their clerks that accused persons frequently do preface what they have to say when called upon to plead with the word "guilty", and then add something which in law and, indeed, in fact, amounts to a plea of not guilty. Such an instance occurs in the case of a person charged with receiving stolen property, who says "guilty, but I did not know it was stolen", which amounts to a plea of not guilty.

In this case, the appellant having said "guilty, in self-defence", he was at once treated by the Court of summary jurisdiction as if this were a plea of guilty, and the order which they made, regarding this as a conviction upon his own confession, was that under section 10 of the Criminal Justice Administration Act, 1914, he should be sent to Quarter Sessions to be sentenced. That would enable the Court of Quarter Sessions, after proper inquiry into the circumstances of the case, to order him to be detained in a Borstal institution, or to deal with the case in any way which the Court of summary jurisdiction might have dealt with it.

Immediately the case was called on, learned counsel who represented the Crown, very properly, and as one would have expected, explained to the learned Recorder what had happened in the Court of summary jurisdiction, and it appeared then and

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there to the learned Recorder that, instead of having before him a person who had been convicted in the Court of summary jurisdiction, he had in fact before him a person who had pleaded in law and in fact not guilty, whose case had not been investigated by the Court of summary jurisdiction, and who had been wrongly sent to the Court of Quarter Sessions for sentence. That being so, the learned Recorder, having listened to what counsel for the prosecution had to say, came to the conclusion that this was a matter which really could not be dealt with at that Court. The accused person was wrongly there, and therefore he ordered his discharge, and learned counsel for the prosecution left, but the Court did not leave. It happened that the appellant did not leave either, because according to the shorthand note of the proceedings, in the passages which are headed with the word " Later "—how much later we do not know—the appellant was duly brought up before the Recorder again. Then the Recorder, without inquiring into any circumstances of the case, without hearing any witnesses, without asking the appellant whether he desired to call any witnesses, or anything of that kind, at once said: " The best way to deal with you is to order you to be detained in a Borstal institution for three years, and then to give you a certificate of appeal, in which case you will provide ", according to the learned Recorder, " a very interesting and difficult question in law "—presumably, for our consideration.

Now we have reached that stage in this long list of errors which entitles us to consider " the interesting and difficult question of law ". The position is that the order which was made by the learned Recorder is an order which cannot stand. The Court of summary jurisdiction should have considered what it was that the appellant said, and should have treated it as a plea of not guilty, and should have investigated the case in the ordinary way. If they then came to the conclusion that the appellant was guilty and should go to Quarter Sessions, they should have convicted him and sent him there accordingly. They did none of these things. They sent him forthwith to

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the Court of Quarter Sessions. When he got there, this order was made without regard to the words of the section of the statute in accordance with which, or in purported accordance with which, he was sent there, namely, section 10 of the Criminal Justice Administration Act, 1914, which provides: "It shall be lawful for the Court,"—that is, the Court of summary jurisdiction—" in lieu of passing sentence, to commit the offender to prison until the next Quarter Sessions, and the Court of Quarter Sessions shall inquire into the circumstances of the case, and if it appears to the Court", etc., they can send him to Borstal or deal with him as the Court of summary jurisdiction might have dealt with him.

In this case, unfortunately, there was no inquiry into the circumstances of the case. This was a case of malicious wounding, and there might well have been important circumstances into which inquiry should be made. It might have been a case, if it had been properly before the Court, in which detention in a Borstal institution for three years was not the appropriate order to make, but perhaps some other method of punishment would have been appropriate.

There are, therefore, two grounds upon which this order must be quashed. The first is that the appellant was never properly before the Court of Quarter Sessions, in that there was never a conviction by the Court of summary jurisdiction. For that reason alone this order would have been quashed. But there is a further ground, that the Court of Quarter Sessions omitted to inquire into the circumstances of the case, as by statute and by cases decided in this Court they were bound to inquire, and on that ground, too, this order must be quashed.

Therefore, the order that the appellant should be detained in a Borstal institution for a period not exceeding three years must be quashed, and the appellant is entitled to be discharged. We leave it to the prosecution to deal with the present situation as they see fit.

Sentence quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE LEWIS AND MR. JUSTICE CROOM-JOHNSON.

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Sentence—Misdemeanour—Sentence to Date From Expiration of Sentence Already Being Served—Offence Committed Before Date of Offence for which Sentence Being Served—Validity—"Subsequent Offence"—Criminal Law Act, 1827 (*7 & 8 Geo. 4, c. 28*), *s. 10.*

By section 10 of the Criminal Law Act, 1827: "Wherever sentence shall be passed for felony on a person already imprisoned under sentence for another crime, it shall be lawful for the Court to award imprisonment for the subsequent offence, to commence at the expiration of the imprisonment to which such person shall have been previously sentenced . . ."

The above section applies only to a sentence passed for felony. In cases of misdemeanour, there always has been, and still is, full power to pass sentence to commence at the expiration of a sentence which is already being served by the offender.

CASTRO (1881), 6 A. C. 229, followed.

Semble, that "subsequent offence" in the above section means "subsequent conviction of an offence" and that the powers conferred by the section are not limited to cases where the second offence has been committed subsequently to the offence for which the offender is already serving a sentence.

Appeal against sentence.

On December 12, 1942, the appellant pleaded guilty at Manchester Assizes to three counts of an indictment charging him with three misdemeanours under the Defence (General) Regulations, 1939, all of which were committed before May 31, 1941. At the time he was serving a sentence of two years' imprisonment passed at Manchester Assizes by Asquith, J., for another misdemeanour committed in December, 1941 (see 28 Cr. App. R. 160). He was sentenced by Oliver, J., to

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twelve months' imprisonment to commence at the expiration of the sentence which he was already serving.

C. N. Gliderwell, for the appellant:

The sentence was wrong in law, in that it was not passed in respect of a "subsequent offence" within the meaning of section 10 of the Criminal Law Act, 1827, or at common law. "Subsequent offence" must mean an offence committed subsequently to the offence for which the sentence is already being served.

[He referred to CASTRO (1880), 5 Q. B. D. 490; affirmed in H. L. (1881), 6 A. C. 229; WILKES (1769), 19 How. St. Tr. 1075; RHENWICK WILLIAMS (1790), 1 Leach 529; and HEMMING (1912), 7 Cr. App. R. 236.] Secondly, the sentence was, on any view of the matter, excessive.

R. H. Blundell, for the Crown.

LEWIS, J.: The appellant appeals on two grounds, first, "that the sentence was wrong in law in that it was awarded in respect of an offence which was not a 'subsequent offence' within the meaning of section 10 of the Criminal Law Act, 1827, or at common law, to begin at the expiration of a term of imprisonment to which the appellant had been previously sentenced, which said imprisonment the appellant was then, and still is, undergoing". The second ground of appeal is that the sentence is excessive.

With regard to the first ground of appeal, it is contended that section 10 of the Criminal Law Act, 1827, applies to this case, and that that section permits the Court to postpone the commencement of a sentence to the expiration of a previous sentence which the prisoner is at the time serving only if the second sentence is in respect of a "subsequent offence", that is to say, an offence committed subsequently to the date of the offence in respect of which the sentence is being served. It is to be observed at the outset that the section in terms deals only with cases where the second sentence is passed for felony. The

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offences for which the sentence against which the appellant now appeals was passed were misdemeanours. Counsel has called our attention to certain authorities. In CASTRO (1880) 5 Q. B. D. 490; affirmed in H. L. (1881), 6 A. C. 229, it was held that in cases of two misdemeanours it was proper to make the sentence for the second offence date from the expiration of the sentence for the first. Lord Selborne, L.C., in delivering the leading opinion in the House of Lords, stated (1881) 6 A. C., at p. 238: "So far, therefore, my Lords, as relates to misdemeanours, and, subject to the question whether this authority would apply when the aggregate of the two punishments exceeds, in point of time, that which there would have been power to award for either offence alone, subject to that distinction, the case of WILKES (1769), 19 How. St. Tr. 1075, 1136, in this House is clear and distinct authority in favour of the proposition that, when a man is found guilty of two misdemeanours, being distinct and separate offences, (I apprehend it makes no kind of difference whether it be by two indictments simultaneously tried and found against him, or upon two counts in one and the same indictment), there not only a competent but the proper course was, and is, to pronounce a second sentence of imprisonment (assuming it to be within the power of the Court as to duration), to commence and begin after the expiration of the first" In the view of this Court there always was power in cases of misdemeanour to adopt such a course. That is laid down in WILKES (*supra*), where the Chief Justice of the Common Pleas (at p. 1136), delivered the unanimous opinion of the Judges to the effect "that a judgment of imprisonment against a defendant, to commence from and after the determination of an imprisonment to which he was before sentenced for another offence, is good in law". In CASTRO, Brett, L.J., commenting on the decision in WILKES (*supra*), said (5 Q. B. D., at p. 514): "The counsel for the plaintiff in error naturally attempted to get rid of the force of the answer by the Judges in the House of Lords by referring to the circumstances under which WILKES (*supra*) was decided. But when

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the Judges were consulted by the House of Lords, they were asked an abstract question; and the question which they were asked was whether a sentence of imprisonment, to commence from and after the termination of an imprisonment to which the defendant had been before sentenced for another offence, was good in law. It is to be observed that the answer has no reference as to whether the sentences were passed for offences charged in one indictment or in separate indictments. The question was general in its terms, and the Judges answered the question put by the House of Lords in the very words in which it was asked, and that answer was that a judgment of imprisonment against a defendant may commence from and after the determination of an imprisonment, to which he was before sentenced for another offence". It is interesting to note that Sir John Eardley Wilmot, C.J., in WILKES (*supra*), in giving his reasons for the decision and answer which the Judges gave, points out that any other course might lead to great injustice. We were also referred to a case which shows what the practice was after WILKES' CASE (*supra*), namely, RHENWICK WILLIAMS (1790), 1 Leach 529. There was no power before the passing of the Criminal Law Act, 1827, to adopt such a method in cases of felony for various reasons, to some of which counsel has referred us. Counsel who argued HEMMING (1912), 7 Cr. App. R. 236, in this Court, where the point was raised and not decided, gave historic reasons why the case was different in questions of felony.

In our view, in the case of misdemeanour, the power to do what Oliver, J., did in this case has always existed, and has never been abrogated. Section 10 of the Criminal Law Act, 1827, is not applicable to this case, but if, as was said in CASTRO (*supra*), the object of the Legislature in enacting this section was to make applicable to cases of felony the power already existing in the case of misdemeanour, it would seem that in cases of felony to which the section is applicable the words "subsequent offence" should be interpreted as subsequent conviction of an offence and not as limiting the exercise

of this power to cases of a second offence committed after the offence for which the defendant is already serving a sentence. In the view which this Court has taken, it is not necessary to decide that question, but we express our view with regard to it. This appeal must be dismissed. The sentence passed was not excessive.

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Appeal dismissed.

Solicitors: Janson, Cobb, Pearson & Co., agents for Dunderdale, Wignall & Co., Manchester, for appellant.

BEFORE

MR. JUSTICE CHARLES, MR. JUSTICE TUCKER AND MR. JUSTICE CROOM-JOHNSON.

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Perjury—Judicial Tribunal—Income Tax Appeal—Two Special Commissioners Only—Whether Tribunal Legally Constituted—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *ss.* 137 (4), 230 (2).

An income tax appeal tribunal consisting of two commissioners is a legally constituted tribunal, and, accordingly, a false statement made on oath before such a tribunal amounts to perjury.

The appellant was convicted of perjury consisting in answers given by him to the special commissioners during his evidence on oath on the hearing of his income tax appeal.

Held, that the question whether in those answers the appellant was asserting a fact, or was merely advancing a contention of law, was a question for the jury and had properly been left to them as such.

Appeal against conviction and application for leave to appeal against sentence.

The appellant was convicted at the Central Criminal Court on December 11, 1942, of perjury and was sentenced by

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Humphreys, J., to twelve months' imprisonment and a fine of £2,500.

The following statement of facts is taken from the judgment of the Court: The appellant was assessed to surtax in respect of the tax year 1938–39 in the sum of £4,200. Against that assessment he gave notice of appeal. His appeal was heard before two of the special commissioners of income tax on July 30, 1941, when the appellant gave evidence, after having been sworn. That appeal was then adjourned, and the hearing had not been resumed at the time of the appellant's trial. The point of that appeal was whether the income arising from certain shares in a company, which the appellant had transferred on July 25, 1938, to two of his daughters, both minors, was to be treated as his income for the purpose of the Income Tax Acts.

The appellant's case was that he had transferred the shares, 60,000, to each of his daughters out-and-out, for valuable consideration, as an ordinary sale; that in respect of one daughter, Heather, he had received the whole consideration money, £22,500; and that in respect of the other one he had received £3,370 4s. 6d. On behalf of the Revenue it was contended that the shares were a gift by the appellant to his daughters respectively. The appellant had been warned by his accountant that the word "settlement" had been judicially interpreted so as to include a gift.

The appellant deposed that the money representing the purchase price of the shares had come from his sister, Mrs. Rutland, in 104,148 United States dollars and thirty cents; that he had received the money from her and was looking to her for the balance, and would get it immediately the war finished; and that his sale of the shares was at 6d. less than the ordinary market price ruling at that time. The suggestion was that the payment by Mrs. Rutland was a gift by her to or for the benefit of her two nieces. At the conclusion of his evidence-in-chief the appellant was asked the following three questions, to which he gave the following

answers: "(Q) Now I want to ask you the same formal question that I asked Mrs. Hood-Barrs, because I want to be quite clear that this is in evidence: In transferring these shares did you make any arrangement with Mrs. Rutland undertaking to provide funds directly or indirectly for the purpose? (A) No. (Q) Did you make any reciprocal arrangements with Mrs. Rutland, meaning, for instance, that if she settled money on your children, you would settle money on her children? (A) No. (Q) So far as you were personally concerned had you any other interest—financial interest—in this transaction other than that you were selling a block of your own shares? (A) No." The gift was challenged, and the appellant was cross-examined as to the financial ability of Mrs. Rutland to make a gift of so large an amount. At no time did the appellant disclose the source from which Mrs. Rutland obtained the money, except to say that she undoubtedly had funds in America, and that she and her husband had done remarkably well in gold transactions on the Los Angeles Stock Exchange.

On December 8, 1942, and following days, the appellant was indicted at the Central Criminal Court for perjury in respect of two of the aforementioned answers, as follows: "First count. Statement of offence: Perjury, contrary to section 1 (1) of the Perjury Act, 1911. Particulars of offence: Henry Rupert Hood-Barrs, on July 30, 1941, in the County of London, being a witness before the special commissioners of income tax in an appeal by him, the said Henry Rupert Hood-Barrs, against an additional assessment of £4,200 in respect of surtax for the year 1938–39, knowingly falsely swore that in transferring to his daughter Heather Pauline Hood-Barrs 60,000 shares in a company called the Steel Barrel Scammells & Associated Engineers, Ltd., in consideration of £22,500 he did not make any arrangement with one Dorothy Rutland by which he undertook to provide funds either directly or indirectly for the purpose". In a second count charging him with perjury contrary to the same section, he was charged with having sworn "that in transferring to his daughter

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Heather Pauline Hood-Barrs 60,000 shares in a company called the Steel Barrel Scammells & Associated Engineers, Ltd., in consideration of £22,500, he had no financial interest in the transaction other than that he was selling a block of his own shares ".

Serjeant Sullivan, K.C., Cyril King, K.C., and *Phineas Quass,* for the appellant.

The Solicitor-General (Sir David Maxwell Fyfe, K.C.) and *L. A. Byrne,* for the Crown.

The arguments are summarised in the judgment.

CROOM-JOHNSON, J., after stating the facts: The appellant now appeals to this Court against conviction, on grounds of law, and applies for leave to appeal against sentence. As to the conviction, the first point taken is that the oath which he took and the evidence which he gave was not before a judicial tribunal. It is said that not less than three special commissioners are requisite to form such an appeal tribunal under the Income Tax Acts, and, there being only two, the proceedings were a nullity. By section 230 (2) of the Income Tax Act, 1918, it is provided as follows: " Anything required under this Act to be done by the general commissioners, the additional commissioners, the special commissioners, or any other commissioners may, save as otherwise expressly provided by this Act, be done by any two or more commissioners ". It is admitted on behalf of the appellant that there was no express provision to the contrary, unless it is to be found in section 137 (4). That sub-section provides as follows: " If, on an appeal, it appears to the majority of the commissioners present at the hearing, by examination of the appellant on oath or affirmation, or by other lawful evidence, that the appellant is overcharged by any assessment or surcharge, the commissioners shall abate or reduce the assessment or surcharge accordingly, but otherwise every such assessment or surcharge shall stand good ". The

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argument is that there cannot be a majority out of two; and accordingly that, reading the two sections together, the express language of section 230 (2), which reads: "Two or more commissioners", must be read as "not less than three" in the case of an appeal.

Section 137 (4) of the Act, in our opinion, is inserted for the benefit of the subject, to show that the determination of a majority of the commissioners in his favour, in cases where a majority is possible, will suffice. We find it impossible to read the implication contended for as arising out of section 137 (4) as an express provision within the meaning of section 230 (2). No authority was cited before us to that effect. It has been the routine practice for many years past, in our experience, for two special commissioners to constitute an income tax appeal tribunal. In view of the critical, and indeed meticulous, examination which the provisions of the Income Tax Acts have received at all hands, at least since the year 1918, it is curious, to say the least of it, if the point is a good one, that no trace of the raising of any issue as to the legality of the practice can be found anywhere in the mass of authorities reported in Tax Cases. The point has been universally overlooked; and yet, if the appeal is right, none of the hearings before, and none of the determinations upon cases stated by, a tribunal of two special commissioners was valid or effective for any purpose. We can see nothing repugnant to section 230 in section 137, and nothing inconsistent in the two sections. If there was anything inconsistent in them, it would be the earlier section which would be impliedly repealed or would have to give way to the later. In our judgment that point fails.

The second point, or group of points, taken is that the questions answered must be taken in their context, that is to say, that they are obviously framed upon the language, respectively, of section 21 of the Finance Act, 1936, and section 38 of the Finance Act, 1938; that in that context they were not untrue, and that had the special commissioners concluded the hearing they must have answered the questions in

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the same way as the appellant did; and that the learned trial Judge ought to have ruled and to have directed the jury that the two answers were true.

We have listened to an elaborate and very full argument on this group of points, including an examination of the words " settlor " and " settlement " in the first of the two sections I have cited, and to appreciate that argument it is necessary to read the relevant parts of the two sections. Section 21 (1) of the Finance Act, 1936, provides: " Where, by virtue or in consequence of any settlement to which this section applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of assessment, the income shall, if at the commencement of that year the child was an infant and unmarried, be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year and not as the income of any other person ". In sub-section (5) of that section there is a reference to sub-sections (2) and (3) of section 20 of an earlier Finance Act, the Finance Act, 1922, and it provides that those sub-sections " shall have effect as if references to paragraph (c) of sub-section (1) of that section included references to the foregoing provisions of this section, as if references to a disposition included references to a settlement, and as if the reference to the making of a disposition included a reference to the making of or entering into a settlement . . ." Sub-section (9) (b) of that section provides: " the expression ' settlement ' includes any disposition, trust, covenant, agreement, arrangement or transfer of assets "; and paragraph (c) of the sub-section says: " The expression ' settlor ', in relation to a settlement, includes any person by whom the settlement was made or entered into directly or indirectly, and in particular (but without prejudice to the generality of the foregoing words of this definition) includes any person who has provided or undertaken to provide funds directly or indirectly for the purpose of the settlement, or has made with any other person a reciprocal arrangement for that other person to make or enter into the settlement ". Section 38 (3) of the Finance Act, 1938,

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provides: " If and so long as the settlor has an interest in any income arising under or property comprised in a settlement, any income so arising during the life of the settlor in any year of assessment shall, to the extent to which it is not distributed, be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year, and not as the income of any other person ". It will be observed that the wording of the sub-section is " so long as the settlor has an interest "; it does not say " so long as the settlor has a *financial* interest ".

We do not think it either necessary or desirable that we should lay down in this judgment what is the precise or exact meaning of those provisions. It is, we think, plain that the questions asked and answered, upon which the indictment rests, were relevant and material to the appeal before the commissioners, and indeed the contrary has not been argued; but the appellant had previously in writing given a certificate dated December 17, 1939, to the effect of at least the first answer, after his attention had been called to section 21 of the Act of 1936.

The question whether the appellant was asserting a fact, or was merely advancing a contention in law that he had done nothing which brought the sections into operation in his case, was, in our opinion, a question for the jury That question was repeatedly and clearly put before the jury by the learned Judge in his summing-up, and on more than one occasion. The appellant did not give evidence at his trial, and called no witnesses, so that the jury had no explanation, apart from argument, as to what his state of mind was in answering the two material questions. The learned trial Judge, in our opinion, fully and amply called attention to the question whether the answers made by the appellant were true or untrue, and directed them more than adequately on the onus of proof.

In order to appreciate the value of the rest of this group of points, it is necessary briefly to refer to the additional facts which were proved at the trial and which had not been disclosed to the special commissioners at the hearing before them. On

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March 12, 1938, the appellant transferred £13,000 from a joint deposit account in the name of himself and his wife to the account of the Mann Steam & Motor Wagon Co., Ltd., in which the appellant held 3,550 out of 3,800 shares, and a Mr. England held 250. On July 25, 1938, the two blocks of shares were transferred to the two daughters, the stated consideration in the case of Heather being a sum of £22,500. On March 31, 1939, £2,500 was transferred from the joint deposit account of the appellant and his wife to the Chalmers Property Investment Co., Ltd., a company in which the appellant held, jointly with his wife, ninety-nine shares, and Mr. England the only other one, and on the same day this company transferred £2,426 1s. 4d. to the Chiltern Bus Co., Ltd., a company in which the appellant held 9,999 shares and Mr. England the only other one. On June 6, 1939, the appellant, as director of what I will call the Mann Co., asked his bank to grant an overdraft of £3,250 to the company on his guarantee, and enclosed a small order draft from the company's funds to Mrs. Rutland in California of £18,550. On the same day he sent a similar draft of £3,300 on the Chiltern Co.'s funds, and another for £400 on the Chalmers Co. Two days later he transferred from the deposit account of the Mann Co. £15,000, which had been there for the last eighteen months. The total drafts amounted to £22,250, that is to say, £250 less than the cost of Heather's shares. They were transferred on June 27 as 104,213 dollars 30 cents, by Mrs. Rutland, who wrote on June 28 to the appellant's bank enclosing a draft for that amount, asking that a separate account should be opened in her name and operated as the appellant directed. A cheque for this amount was drawn on the account in favour of the girl Heather, who endorsed it and apparently paid it into the appellant's banking account. In the month of June, 1939, and not in the month of January, 1939, as deposed to by the appellant before the commissioners, and as stated in a certified copy letter from Barclays Bank to the appellant put in before the commissioners, that bank opened that account in dollars in the appellant's name. The

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dollars were offered to the Treasury on the outbreak of war, and they realised a profit on the exchange of £3,370, so that they more than met the cost of Heather's shares, instead of being £250 too little, as at the time of the remittance in June. It is to be observed that all the transfers on this side of the water were done by banking accounts, and the transfers from the other side to this side were done by banking accounts, all of them in the same bank, and at the same branch of it. The whole of these transactions will be found set out in tabular form in an exhibit which was used at the trial.

We are quite unable, upon the uncontradicted evidence (and, we may add, uncontradictable evidence) of the transfers of money, to come to the conclusion that the learned Judge was bound as a matter of law to direct the jury that the appellant's answers to the two questions were true. Much was made in argument before us of the fact that Mr. Middleton, the accountant to the appellant and his company, expressed the view at the trial that the transactions were transactions of loan between the different companies and to Mrs. Rutland, but we do not think that the jury were in all the circumstances bound to accept that answer. In our judgment the question of what was the substance of the matter and the true effect of all these transfers of money were essentially questions for the jury, as were also for the jury the inferences to be drawn from those facts.

Whether the transactions were loans or gifts, the question still remained: Had the appellant directly or indirectly provided the money, and had he done so pursuant to an arrangement between Mrs. Rutland and himself? What would have been the result of a finding that he had, on the determination by the special commissioners of the legal problems involved in the two sections, is, we think, neither here nor there on the issues did the appellant by his answers assert facts? were those answers false, and false to the appellant's knowledge? It was said in argument that there was no proof of an arrangement between the appellant and

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Mrs. Rutland, but we think there were ample facts proved upon which the jury could find that there was an arrangement, contrary to his sworn statement that there was not.

Finally, it was objected that the learned Judge omitted to direct the jury as to the law applicable to the second count; and in particular, that he failed to direct them as to what interest it was which would make the appellant a settlor within the meaning of section 38 of the Act of 1938, or what the word "interest" meant in that section. In our opinion, there was no necessity so to direct them, apart from the general directions of law on the whole case on both counts, which were full and clear. If the jury found that the appellant was merely asserting a contention or opinion of law in answering the second question, then the direction to them to acquit was plain. If they thought that they were questions of fact, then it seems to us that there was no necessity to explain to a jury in the City of London what a financial interest is in a transaction which the appellant said was a transaction of sale and purchase.

To pray in aid the possible difficult questions of income tax law which might arise once the true facts had been ascertained by the commissioners, is to confuse the issue. Once the jury were satisfied that the appellant was purporting to depose to facts—and they must have been so satisfied in view of their verdict—the law applicable to the issues raised in that appeal did not affect the matter. They were plainly told that they had to be satisfied that he was deposing to facts before they could convict. The passage to which our attention was called by the learned Solicitor-General is an example of the plain direction which the learned Judge gave upon the two counts, specifying more than sufficiently, in our judgment, the two statements made. By their verdict the jury have obviously accepted that view of his answers. That being so, the general facts of the case applied equally to both counts, and the learned Judge's separate references to the second count were, in our opinion, more than sufficient to enable the jury to appreciate such differences as there were between the two counts.

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Taking the summing-up as a whole, there is, in our judgment, no fault to be found with the direction on the second count. In those circumstances, this second point or group of points equally fails, and in our judgment the appeal against conviction must be dismissed. The application for leave to appeal against sentence has been withdrawn, and we need say no more about it.

Appeal dismissed.

Solicitors: Denton, Hall & Burgin, for appellant; Solicitor of Inland Revenue, for the Crown.

BEFORE

MR. JUSTICE CHARLES, MR. JUSTICE TUCKER AND MR. JUSTICE CROOM-JOHNSON.

JAMES HUDSON.

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Larceny—Animus Furandi—Mistake—Time of Taking—Misdelivery of Letter Containing Cheque—Receipt of Cheque Only When Letter Opened and Cheque Discovered.

A letter containing a cheque from the Ministry of Food was delivered by mistake to the appellant, who received the letter innocently. He subsequently opened the letter and appropriated the cheque, though he was not expecting to receive any cheque from the Ministry. The Judge directed the jury that the material time at which they must consider the appellant's state of mind was the time when he opened the letter and first discovered that it contained a cheque, and that if they were satisfied that at that time the appellant had the *animus furandi* in relation to the cheque, they should convict him of larceny of the cheque.

Held, that the direction was correct in law, as the appellant did not receive the cheque until he opened the letter and discovered that it contained a cheque.

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MUCKLOW (1827), 1 Moo. C. C. 160, and DAVIES (1856), Dears. C. C. 640, not followed.

ASHWELL (1885), 16 Q. B. D. 190, considered and applied.

Appeal against conviction (on certificate).

The appellant was convicted on February 12, 1943, at Lincolnshire Assizes, of larceny of a cheque, of forgery and other charges under the Forgery Act, 1913, in connection with that cheque, and of obtaining from a bank £20 by false pretences by means of the same cheque. He was sentenced by Lewis, J., to concurrent terms of three months' imprisonment.

On June 20, 1942, Mr. Lewis Hutson, of 96 Scotter Road, Scunthorpe, Lincs, took three pigs to a Government slaughter-house at Scunthorpe and sold them to the Ministry of Food. On July 4, a cheque for £23 2s. 7d. was made out by the Ministry, but by inadvertence the name of the payee was typewritten "Mr. Hudson". The cheque was headed in large letters "Ministry of Food, Meat and Livestock" and was signed: "Ministry of Food, Chairman of Auctioneers, No. 28 County Meat Account". The letter containing the cheque was delivered to the appellant, who lived at North Farm, Yaddlethorpe, Scunthorpe, a little distance off the Scotter Road. On July 11 the appellant returned the cheque and wrote the following letter to the Ministry: "Mr. J. Hudson, Scotter Road, Scunthorpe. Dear Sir—Just a line to tell you that I have received a cheque from Ministry of Food and there was no initial on it, so I have sent it back to you. My name is Mr. J. Hudson. Yours truly, J. Hudson."

On July 14 the Ministry returned the cheque to the appellant with the initial "J." inserted in ink between the "Mr." and "Hudson". On July 17 the appellant opened an account at Barclays Bank, Scunthorpe, by paying in that cheque, which had been previously endorsed "J. Hudson". That signature was placed over a 2d. stamp on the back of the cheque, below a receipt in these words: "Received from a Ministry of Food, Meat and Livestock Branch the sum shown on the face hereof

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in settlement of fat stock purchased ". On August 31 he drew £20 out of that account. On October 17 the appellant was interviewed by the police and made a statement in the course of which he said that he had not any money due to him from the Ministry of Food.

At the close of the case for the prosecution defending counsel submitted on the authority of MUCKLOW (1827), 1 Moo. C. C. 160, and DAVIES (1856), Dears. C. C. 640, that there was no case to go to the jury on the charge of larceny, on the ground that the appellant had no *animus furandi* when he received the letter containing the cheque. The Judge overruled that submission, but after conviction gave a certificate under section 3 (b) of the Criminal Appeal Act, 1907, on the question whether or not the facts deposed to by the prosecution (which were not challenged or contradicted by the appellant) constituted evidence of larceny, and whether or not he was wrong in law in not withdrawing the case from the jury.

S. L. Elborne, for the appellant:

The receipt of the cheque by the appellant took place when the letter containing it was placed in his hands and at that time there was no *animus furandi*. The decisions in MUCKLOW (*supra*) and DAVIES (*supra*), which have never been overruled to that effect, are directly in point. It is true that in some of the judgments in ASHWELL (1885), 16 Q. B. D. 190, where directly conflicting views were taken in the Court for Crown Cases Reserved, seven Judges being for allowing the appeal, and seven for affirming the conviction, those earlier decisions were criticised, but Stephen, J., evidently treated them as being still law. The same view appears to be taken in Pollock & Wright's *Possession in the Common Law*. If at the time of the receipt of the cheque there was no *animus furandi*, the appellant clearly could not be guilty of larceny. The Judge should, therefore, have withdrawn the case from the jury. Further, the conviction of forgery was wrong, because

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there was no evidence that the indorsement was in the appellant's handwriting, and the conviction of obtaining money by false pretences was wrong, because when the appellant drew a cheque for £20 on his account on August 31 and obtained that sum from the bank he made no false pretence at all.

T. R. Fitzwalter Butler, for the Crown:

It is conceded that before the appellant could be convicted of larceny it was necessary that *animus furandi* should exist at the time when the appellant received the cheque and that no subsequent appropriation would suffice. But the receipt of the cheque by the appellant did not take place until the appellant opened the letter and discovered the existence of the cheque. In so far as MUCKLOW (*supra*) and DAVIES (*supra*) purported to decide the contrary, they must be regarded as now no longer law. They are clearly irreconcilable with other decisions such as MERRY *v.* GREEN, 7 M. & W. 623, and this is emphatically pointed out in Cave, J.'s judgment in ASHWELL (*supra*), and the view is there expressed that MUCKLOW (*supra*) and DAVIES (*supra*) ought not to be followed. The principle applicable to cases such as the present is concisely stated in Lord Coleridge, C.J.'s judgment in ASHWELL (*supra*), where he states (at p. 225): "In good sense it seems to me he did not take it till he knew what he had got, and when he knew what he had got, that same instant he stole it". Moreover, in ASHWELL (*supra*), where the conviction was affirmed, the facts were far more favourable to the prisoner than in the present case. In that case, the prosecutor intended to hand to the prisoner the particular coin which he held in his hand; in the present case the Ministry of Food did not intend to hand over to the prisoner the particular cheque or any cheque at all.

CHARLES, J.: The point of law which was taken at the trial was that there was no evidence of larceny to go to the jury. That point was argued before Lewis, J., and he came to the conclusion that there was and left the issue to the jury, who convicted. It falls, therefore, to this Court to decide whether,

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in the circumstances of this case, there has been established in law evidence of larceny committed by the appellant.

The matter at first sight would seem, perhaps, to be somewhat complicated, because of decisions which appear, at any rate on the face of them, to be in disagreement with each other. The appellant relied on two cases in particular: MUCKLOW (1827), 1 Moo. C. C. 160, and DAVIES, Dears. C. C. 640. In the first of those two cases, it was decided—upon what ground it is not quite clear, for the report is very scanty—at a meeting of the Judges in Easter term, that the conviction in the following circumstances was wrong. The prisoner took a letter supposing it to belong to him. He then found that it did not belong to him and appropriated to himself certain property which it contained. It was held that, there being no *animus furandi* when he first received the letter, there was no larceny. In DAVIES (*supra*) the Court came, in the similar circumstances of that case, to the same conclusion. But the matter was exhaustively considered in 1885 by the Court for Crown Cases Reserved in ASHWELL, 16 Q. B. D. 190. That case was considered by fourteen Judges. In the circumstances of that case seven of them held that there was larceny and seven of them held that there was not larceny. The jury having convicted of larceny, and there being an equal division in the Court, the conviction stood. The circumstances of that case were as follows: The prisoner asked the prosecutor for the loan of a shilling. The prosecutor gave him a sovereign believing it to be a shilling; and the prisoner took the coin under the same belief. Some time afterwards he discovered that the coin was a sovereign and then and there fraudulently appropriated it to his own use. He was convicted of the larceny of the sovereign, and that conviction stood.

There are certain observations in the judgments in ASHWELL (*supra*) which I think give useful guidance to the attitude we ought to adopt in this appeal. Cave, J., in his judgment said: "In MIDDLETON (1873), L. R. 2 C. C. R. 38, in which it was held by eleven Judges against four that, where there was a delivery

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of money under a mistake to the prisoner, who received it *animo furandi*, he was guilty of larceny, and there occurs (at p. 45) a passage in the judgment of some of the Judges who formed the majority, which is as follows: 'We admit that the case is indistinguishable from the case supposed in the argument, of a person handing to a cabman a sovereign by mistake for a shilling; but after carefully weighing the opinions to the contrary, we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not would depend upon this, whether he, at the time he took the sovereign, was aware of the mistake, and had then the guilty intent, the *animus furandi*' ". Then Cave, J., continued: " For my part, I am quite unable to reconcile the cases of MUCKLOW (*supra*) and DAVIES (*supra*) and the passage I have cited from MIDDLETON (*supra*) with those of CARTWRIGHT *v.* GREEN (1803), 8 Ves. 405, and MERRY *v.* GREEN (1841), 7 M. & W. 623, and, being compelled to choose between them, I am of opinion that the law is correctly laid down in MERRY *v.* GREEN (*supra*) for the following reasons. The acceptance by the receiver of a pure benefit unmixed with responsibility may fairly be, and is in fact presumed in law until the contrary is shown; but the acceptance of something which is of doubtful benefit should not be and is not presumed. Possession unaccompanied by ownership is of doubtful benefit; for although certain rights are attached to the possession of a chattel, they are accompanied also by liabilities towards the absolute owner which may make the possession more of a burden than a benefit. In my judgment a man cannot be presumed to assent to the possession of a chattel; actual consent must be shown. Now a man does not consent to that of which he is wholly ignorant; and I think, therefore, it was rightly decided that the defendant in MERRY *v.* GREEN (*supra*) was not in possession of the purse and money until he knew of their existence ". There are other passages which are important in the judgments of some of the other Judges, particularly a passage in the judgment of Stephen, J. (at p. 216): " If a man

finds a purse, picks it up, opens it, finds money in it, and thereupon determines to keep it for himself, it appears to me that the whole process ought to be regarded as one action, taking place at one time, as for many purposes the fractional parts of a day are not regarded by the law. If the examination were delayed for a substantial time, I think the question for the jury would be whether at the time of the taking the prisoner intended to keep what he found, conditionally upon its turning out upon examination to be worth his while to do so, and whether at the time of the taking the goods he had means of knowing the owner ". I think that those words really go to the heart of the whole of this case. The appellant received an envelope. What he did with it for some days we do not know; it is not disclosed in the evidence. Later he opened it, and when he opened it, he discovered a cheque in it that was palpably valuable and equally palpably belonged to somebody else. At that moment he could for the first time allow his intelligence to operate. He could then form his intent. Before that he could not. There was evidence that when his intelligence began to operate, he said to himself then and there, " I am going to appropriate and take away from the rightful owner property which he has not consented to give me and which I do not intend to return to him. I intend permanently to deprive him of his property ".

It appears to us that this case comes also within the words of Lord Coleridge, C.J., in ASHWELL, 16 Q. B. D., at p. 225 : " In good sense it seems to me he did not take it till he knew what he had got; and when he knew what he had got, that same instant he stole it ". There is ample evidence that that is what the appellant did in this case. As soon as he saw what he had got, he made up his mind to steal it and he did steal it. He did all that was necessary to cause him to complete the offence of larceny.

The other points are not so strenuously taken. They were not taken before the learned Judge. But it was suggested to this Court that there was no forgery, because there was no evidence that the handwriting of the indorsement was the

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appellant's. There was ample evidence for the jury to consider that it was his handwriting, and they came to the conclusion that it was. By signng the cheque by way of endorsement he brought into existence a false document and so committed forgery.

It was argued also that he did not make a false pretence to the bank. We have considered that point, and we do not think that there is any substance in it. The false pretence was made, not at the moment of his going to the bank to draw the £20, but as part of his whole scheme in opening the account and by reason of that false pretence the bank was induced to pay out to him the sum of £20.

We are, therefore, of opinion that there was ample evidence for the jury to consider on all the counts of the indictment and that the appeal must be dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE LEWIS.

HARRY CARNEGIE PEEL.

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Sentence — Recognisance — Condition of Repayment Attached — Practice Held Undesirable.

It is undesirable that a criminal Court should make itself the medium of compelling a debtor to pay his debt, or should join in any arrangement about the repayment of money to the prosecutor.

Application for leave to appeal against sentence.

On February 6, 1941, the applicant pleaded guilty at Middlesex Sessions to embezzling from his employers two sums amounting to £5 13s. 8d. It was stated by counsel for the prosecution that investigations had disclosed defalcations by the applicant amounting in all to £70, and the applicant did not dispute that allegation. The Chairman ordered that he should be bound over under probation and that a condition should be attached to the recognisance requiring the applicant to pay at least 10s. a week to the prosecutors until the whole £70 had been repaid. By May 1, 1941, the applicant had paid more than £5 13s. 8d., but had not kept up the payment of 10s. a week regularly. He was brought again before the Court, and the recognisance was continued, on his undertaking to allow 10s. a week to be deducted from his salary. In January, 1943, he was again brought before the Court on the ground that he had not kept up his payments regularly, and the recognisance was again continued, on his undertaking himself to pay 10s. a week from his salary from a new employment which he had recently obtained. Finally, on March 4, 1943, he was again brought before the Court and it was then established that, whereas he should have paid £4

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between the date of his last appearance and March 4, he had only paid £3. He was then sentenced to six months' imprisonment with hard labour.

No counsel appeared on either side.

HUMPHREYS, J.: This is a case in which a procedure was followed at Middlesex Quarter Sessions which is to be strongly condemned. The Chairman, no doubt from motives of pity and a desire to do the best possible thing for the applicant, was induced by the prosecution, with the full approval of the applicant, to do something which in our opinion was quite irregular. He said on February 6, 1941, that he would bind the applicant over to come up for judgment if called upon, and added: "We shall make it a condition of the recognisance that you pay a sum of at least 10s. every week to the prosecutors. You will be subject to probation, and the probation officer will see that that is being done." Accordingly, the applicant was bound over, one of the conditions being that he should pay 10s. every week to the prosecutors until he had repaid, not the sum which was mentioned in the indictment, £5 13s. 8d., but the total of £70, which it was said was owing from him, but which, if it was owing from him, as he seems to have admitted, was clearly no more than a civil debt. The applicant entered into that recognisance. The next date on which he appeared before the Court, at the instance of the prosecutors, was May 1, 1941, when it was established that he had not paid the 10s. a week regularly. It is quite clear that by that time he had more than repaid the amount of £5 13s. 8d., for embezzling which he was prosecuted. After some discussion the Chairman, again, no doubt, with the most excellent intentions, said that he would let the matter stand over until the next day, to see whether the applicant could find some more money, using these words: "We will give you a little more rope. Understand, it has got to be carried out strictly." On the next day the applicant was brought up and the Chairman was

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informed that he was prepared to allow 10s. a week to be deducted from his wages until he had paid the whole amount. Then the recognisance was ordered to be continued.

In January, 1943, the applicant was again brought up, and the Court was informed that, although for many weeks he had regularly paid 10s. a week, he had not kept his payments up-to-date because he had recently lost his employment. He said, however, that he had just got another situation, and that he would be able to pay more money to the prosecutors out of his salary. He agreed to pay 10s. a week, and the matter was adjourned again that he might be induced—I use the mildest expression—to pay this civil debt. Finally on March 4, 1943, he was brought up again and it appeared that, whereas he ought to have paid £4 as between that date and the date of his previous appearance, he had only paid £3. He was then sent to prison for six months with hard labour.

We have no doubt that the Chairman throughout was actuated by the highest motives, but this Court desires it to be understood that it strongly disapproves of any criminal Court making itself the medium of compelling people to pay their debts. That is not the function of criminal Courts. The Court of quarter sessions in this case was really turning itself into a debt-collecting society and helping the prosecutors to recover money for which they might have claimed in the county court, where, probably, they would have got an order for a much smaller amount than 10s. a week. At all events, imprisonment for debt is supposed to be abolished in this country. The applicant, as we know now, has been sentenced to six months' imprisonment because, apparently, he has paid only £3 out of the £4.

We hope that these observations will be duly communicated to the justices of Middlesex Quarter Sessions, and that this practice, if it be a practice, will cease, since it is most undesirable that any criminal Court should join in any arrangement about the repayment of moneys. If, in the first instance, the Chairman had done what obviously it was in his

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mind to do, namely, to say: "This is a civil matter, in so far as the applicant has undertaken to pay the money which he says he lost. He has now admitted that he embezzled part of that money and we must deal with him for that, but we are not going to have anything to do with any attempt to force him to pay the whole amount under the threat of criminal proceedings", it would have been very much better. We give the applicant leave to appeal, and, since we are satisfied that the prosecution would not desire in such a case to be represented, we will deal with the appeal now and order that the sentence be altered to a sentence which will enable him to be discharged forthwith.

Sentence reduced.

NOTE.—The Editor is informed that owing to an oversight no notification of the appeal was sent to the Chairman of Quarter Sessions and that he had, therefore, no opportunity of making a report to the Court of Criminal Appeal on the case.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE LEWIS.

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HOWARD BATEMAN CARR-BRIANT.

Burden of Proof—Matter Presumed against Defendant "Unless the Contrary is Proved"—Degree of Proof Required—Analogous to that Placed on Party in Civil Action—Evidence Satisfying Jury of Probability—Prevention of Corruption Act, 1916 (6 & 7 *Geo.* 5, *c.* 64), *s.* 2.

In any case where, either by statute or common law, some matter is presumed against an accused person "unless the contrary is proved", the jury should be directed that it is for

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them to decide whether the contrary is proved, and that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond reasonable doubt and analogous to that laid on a plaintiff or defendant (as the case may be) in a civil action. The burden, therefore, may be discharged by evidence satisfying the jury of the probability of that which the accused person is called on to establish.

SODEMAN, [1936] W. N. 190; [1936] 2 All E. R. 1138, and WARD, 11 Cr. App. R. 245; [1915] 3 K. B. 696, followed and applied.

EVANS-JONES AND JENKINS (1923), 17 Cr. App. R. 121, discussed.

Appeal against conviction.

The appellant was convicted at Salop Assizes on February 19, 1943, of corruptly giving a consideration, namely £60, by way of gift or loan to a person in the employment of the War Department as an inducement or reward for showing favour to a company of which he was an agent in the affairs of the War Department, contrary to section 1 of the Prevention of Corruption Act, 1906. He was sentenced by Charles, J., to twelve months' imprisonment.

The main facts were not in dispute. The appellant was a director of Pye Bros. (Hereford), Ltd., which on August 23, 1940, entered into a contract with the Royal Engineers Branch of the War Department for artificers' work, the contract to run from September 1, 1940. From time to time works orders were issued under that contract. The contractor would be entitled to interim payments in respect of work done by him under the contract, and such payments would only be made upon the certificate of the garrison engineer that the work had been satisfactorily performed and the money was due. The garrison engineer in respect of the contract in question was Sidney John Baldock, a Government employee. On September 5, 1940, the appellant gave or lent to Baldock a sum of £60 to pay for a second-hand motor car which Baldock had agreed to buy from a motor engineer in Shrewsbury. By the terms of section 2 of the Prevention of

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Corruption Act, 1916, the onus of proving that the payment made under these circumstances was not corruptly made as an inducement or reward contrary to the Act of 1906 is placed upon the defendant.

On the question of burden of proof the Judge directed the jury "only if you are completely satisfied that [the money] was given innocently, simply as an act of extraordinary friendship, will you find him not guilty. Otherwise you will find him guilty". He laid down the proposition that the burden of proof resting on a defendant to negative corruption was as heavy as that resting in a normal case on the prosecution.

W. T. Cartwright Sharp, K.C. (*E. G. H. Beresford* and *R. Lacks*, with him), for the appellant:

The summing-up was defective in two respects. In the first place, the Judge never put the defence to the jury, and expressly told the jury to disregard salient points urged on behalf of the defence, as to which there was a real issue of fact. [He dealt with a number of such points in detail.] Secondly, there was a misdirection on burden of proof. The Judge expressly directed the jury that the burden resting on the appellant to negative corruption was just as heavy as that resting in a normal case on the prosecution, that is to say, that the appellant was bound to satisfy the jury beyond all reasonable doubt. A considerably less degree of proof is required for a defendant in such circumstances and it may fairly be compared to that resting on a party in a civil action. So far as the defence of insanity, the burden of establishing which rests on the defendant, is concerned, this principle was clearly recognised by the Privy Council in SODEMAN, [1936] W. N. 190; [1936] 2 All E. R. 1138, and since that decision Judges have generally accepted the principle in directing juries on a defence of insanity in a criminal trial. WARD, 11 Cr. App. R. 245; [1915] 3 K. B. 696 is a useful authority indicating the degree of proof required from a defendant on a charge analogous to the present, namely, that of being found by night

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in possession of implements of housebreaking. It appears not to have been regarded as applicable in EVANS-JONES AND JENKINS (1923), 17 Cr. App. R. 121, in which case there are certain *dicta* which appear to support Charles, J.'s direction, but in the submission of the appellant it was directly in point and should have been followed. [He referred also to WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 25 Cr. App. R. 72; [1935] A. C. 462.]

J. F. Bourke, for the Crown:

In SODEMAN (*supra*) it was said that the Court should not interfere with the verdict except in a clear case, and the Judicial Committee declined to hold that the jury could have been misled. Yet the terms of the summing-up (according to the argument of counsel for the appellant) were quite as strong against the prisoner as those used in the present case. Further, the point in SODEMAN (*supra*) was the proper direction on a defence of insanity. The conception of the defence of insanity is peculiar and artificial, derived from case law. Where a statute enacts that, on proof of certain facts, the accused person is to be deemed guilty unless the contrary is proved, this must mean proved beyond doubt. The only authority directly in point is EVANS-JONES AND JENKINS (*supra*), which was a corruption case under the Act of 1906. There, a direction to the jury that if they had any doubt they must convict was held correct. The use of the expression "reasonable doubt" can make no difference.

The jury were not misled or induced to disregard any real point made for the defence. The Judge encouraged them to find in the prisoner's favour that the transaction was only a loan. Yet they found him guilty on the count alleging a gift.

At the conclusion of the arguments the Court announced that the appeal must be allowed and the conviction quashed, and that they would give their reasons for their decision at a later date.

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May 25.—The judgment of the Court was read by:

HUMPHREYS, J.: This appellant was convicted by a jury at the assizes held at Shrewsbury of an offence against the Prevention of Corruption Act, 1906. There were two counts in the indictment, and the verdict was entered upon the first count. No point was raised upon the appeal as to the difference between the counts, which in fact related to the same matter.

The charge against the appellant was that, being an agent for Pye Bros. (Hereford), Ltd., who held a contract from the War Department, he corruptly gave to Sidney John Baldock, a person in the employment of the War Department, a consideration, to wit £60, by way of gift or loan as an inducement or reward for showing favour to Pye Bros. (Hereford), Ltd., in the affairs of the War Department. [His Lordship stated the facts as set out above, and continued.]

The grounds of appeal relate solely to the summing-up of Charles, J. The learned Judge clearly formed a strong view adverse to the appellant's case and the arguments addressed to the jury by his counsel, Mr. Cartwright Sharp. He was entitled to hold that view, and even to express it, so long as he left fairly to the jury the decision of the case upon the evidence and the contentions of the parties.

The first ground of complaint is that the learned Judge not only failed to put the defence of the accused man to the jury, but directed the jury to ignore the relevant arguments and contentions addressed to them by his counsel. If this ground can be established, it is manifest that the conviction cannot be upheld. After full argument, the Court came to the conclusion that the appeal must be allowed and the conviction quashed. We now proceed to state our reasons for that decision. After referring to section 2 of the Act of 1916, the learned Judge dealt with four of the points made by counsel and directed the jury as to all four in these terms: "Those are the matters that I wanted to remove right away from your

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consideration because they do not affect the case. . . . Mr. Cartwright Sharp occupied a considerable part of your time as to a consideration of whether it is a payment made as a loan; and he says: 'I want you to look at that book, that will show it was a loan'. . . . If it was a loan, it was a consideration in law and you may think, when I come to deal with the case itself, a very useful and valuable consideration for Baldock, one which he was very, very anxious to get." Now as a proposition of law that is, of course, perfectly accurate. We were told, however, by Mr. Cartwright Sharp (and Mr. Bourke for the Crown agreed) that no submission to the contrary had ever been made. It was, however, strongly contended at the trial by the Crown that the payment was a gift and by the defence that it was a loan, and the defendant in the witness-box produced a book purporting to show repayment by instalments of some £22 of the £60. The point made by the defence was that a genuine loan was much less likely to be a corrupt transaction than a gift. That being so, it was quite unjustifiable to treat the topic as an immaterial one and to withdraw it from the consideration of the jury. We think that there must have been some misunderstanding by the learned Judge as to the point being made. The next is dealt with as follows: "Still more of the ingenious narrations of Mr. Cartwright Sharp were devoted to this question: Did Baldock show favour? It does not matter tuppence whether he did or whether he did not. There may very well be cases where a dishonourable garrison engineer is collecting money or considerations from those who are willing to give it to him with no intention of doing anything on his side at all. It does not matter tuppence. So put that out of your minds once and for all." Here again, the statement of law is accurate. The complaint here is of non-direction. Mr. Bourke had opened and attempted to prove that, as a result of the bribe to Baldock, the company had in fact made an illicit profit. Evidence was called and the defendant was cross-examined on the matter, but in re-examination apparently satisfied the learned Judge, who

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observed: "I shall tell the jury that they had better wash that out of their minds altogether." It was certainly unfortunate that the learned Judge should have made no reference in his summing-up to the fact that the defendant had cleared himself and the company on the allegation of having made an illicit profit; but the jury had heard all that took place and were possibly not affected by the omission.

The last, and in our opinion by far the most serious, allegation of misdirection related to the absence of secrecy in the transaction. It is dealt with in the summing-up as follows: "Then, finally, Mr. Cartwright Sharp sets up his last skittle, which he says is conclusively in favour of the accused, that instead of creeping round by back streets and giving this man notes, he actually sent a cheque to the motor car dealer, and he says: 'It is ludicrous to think that he would have done that if he thought or intended to do anything that was wrong.' But just look. What is the explanation and answer to that, and how does that skittle come down? He was a very acquiescent gentleman who, after one month, is asked by this man, who heretofore had been a total stranger, to lend him £60. 'About a week later', says Mr. Carr-Briant, 'he rang up one night and said he had now found a car suitable off a man Lucas of Shrewsbury. If I was still willing to lend him money would I send the cheque to Lucas, which I did'. . . . Those are matters that I wanted to remove right away from your consideration, because they do not affect the case." If the learned Judge had confined himself to his suggestion as to the reason for giving a cheque, the comment would perhaps have been legitimate; but the last quoted words constitute a direction to ignore what was a perfectly proper, and may well have been regarded as a strong, point for the defence. Secrecy has always been regarded as the badge of fraud. To treat as irrelevant the fact that a man on trial for having made a corrupt payment is able to show that he made the payment in question by a cheque made payable to and sent to an admittedly innocent third party amounts, in our judgment, to

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a denial of justice. Upon that ground the Court allowed the appeal and quashed the conviction.

The second ground relied upon for the appellant is that the learned Judge misdirected the jury as to the extent of the burden of proof placed upon an accused person by the terms of section 2 of the Prevention of Corruption Act, 1916. That section provides, *inter alia*, that, where in any proceedings against a person for an offence under the Prevention of Corruption Act, 1906, it is proved that any consideration has been given to a person in the employment of a Government Department by the agent of a person holding a contract from a Government Department, the consideration shall be deemed to have been given corruptly as such inducement or reward as is mentioned in the Act, unless the contrary is proved. The learned Judge directed the jury on this point as follows: "What has the accused got to do? He has not only got to discharge the burden of proof to the contrary of corruption, he has not only got to prove that he gave it without a corrupt motive, but he has got to do so beyond all reasonable doubt. Indeed, it has been held if the jury are left in doubt by the evidence given on behalf of the accused they must convict him. That is the law by which I am bound and by which you and every subject of this country is bound." Again, the last words of the summing-up are: "Are you satisfied beyond all reasonable doubt? If you are not satisfied, find him guilty. If you have any doubt about it find him guilty. Only if you are completely satisfied that in all these circumstances, having regard to the nature of Baldock, the man, the time when the loan was made—only if you are completely satisfied that it was given innocently, simply as an act of extraordinary friendship, will you find him not guilty. Otherwise you will find him guilty." That is to say, the learned Judge laid down the proposition of law that the onus of proving his innocence lay on the accused person and that the burden of proof resting on him to negative corruption was as heavy as that resting in a normal case upon the prosecution.

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Mr Bourke for the Crown relied in support of that proposition upon R. *v.* EVANS-JONES AND JENKINS (1923), 17 Cr. App. R. 121. In that case, the Court upheld a direction to the effect that, if after hearing the defence the jury had any doubt, then the jury must find the accused person guilty. In the report such expressions as " the defendant must show that the payments were not corrupt ", " if they had any doubt on that they must convict " and " the explanation required is an explanation which satisfies the jury ", were treated as interchangeable. The question whether the onus upon the accused person under the section was the same as that resting in the first place on the prosecution was not discussed. Moreover, Shearman, J., appears to liken the onus placed upon an accused person by section 2 of the Act of 1916 to that in a defence of insanity. There can, however, be no doubt that the onus on the accused person in a defence of insanity is far different from that normally resting on the prosecution.

In the course of the argument of that case reference was made to WARD, 11 Cr. App. R. 245; [1915] 3 K. B. 696. The Court considered it as throwing no light upon the case under discussion. In our view, however, that case is by no means unimportant, having regard to the principle contended for in the present case. The appellant in that case had been convicted of the offence created by section 58 of the Larceny Act, 1861 (now section 28 of the Larceny Act, 1916) of having been found by night in possession of implements of housebreaking " without lawful excuse, the proof of which shall lie on such person ". The implements were such as would form part of the outfit of a bricklayer and the appellant was a bricklayer by trade. The Court quashed the conviction on the ground of misdirection, the trial Judge having told the jury that the appellant had to satisfy the jury that he was rightly in possession of the tools at the time and had no unlawful intention. Lord Reading, in giving the judgment of the Court, observed (11 Cr. App. R., at p. 246; [1915] 3 K. B., at p. 697): " It was for the appellant to satisfy the jury that in the words

of section 58 he had a lawful excuse. . . . It was stated by the appellant in his evidence and not disputed by the prosecution that he was a bricklayer. That being so, and the tools being admittedly bricklayers' tools, the appellant had established *prima facie* that he had a lawful excuse for being in possession of the tools and the onus was shifted on to the prosecution to prove to the satisfaction of the jury, if they could, from the other circumstances of the case, that the appellant was not in possession of the tools for an innocent purpose but for the purpose of housebreaking."

That authority is, in our opinion, inconsistent with the notion that words throwing the onus of proof of certain matters upon the accused person involve placing the accused person in the same position as the prosecution in a normal case, so as to require of him that he should prove his case beyond any reasonable doubt. Moreover, it seems to us to be in accord with the principle of our law expressed in the well-known passage in the speech of Viscount Sankey, L.C., in WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 25 Cr. App. R. 72, at p. 95; [1935] A. C. 462, at p. 481: "No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained." We see no reason why the rebuttable presumption created by this section and the words "unless the contrary is proved" should not be construed in the same manner as similar words in other statutes, or similar presumptions at common law, for instance, the presumption of sanity in the case of an accused person who is setting up the defence of insanity. We agree with and adopt for the purpose of this judgment the language of Lord Hailsham, L.C., in delivering the judgment of the Privy Council in the case of SODEMAN, [1936] W. N. 190; [1936] 2 All E. R. 1138, at p. 1140. The Lord Chancellor observed as follows: "The suggestion made by the petitioner was that the jury may have been misled by the Judge's language into the impression that the burden of

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proof resting upon an accused to prove insanity is as heavy as the burden of proof resting upon the prosecution to prove the facts which they have to establish. In fact there is no doubt that the burden of proof for the defence is not so onerous. . . . It is certainly plain that the burden in cases in which an accused has to prove insanity may fairly be stated as not being higher than the burden which rests upon a plaintiff or defendant in civil proceedings. That this is the law is not challenged." In so holding the Lord Chancellor was in agreement with the decision of the majority of the Supreme Court of Canada in CLARK (1921), 61 S. C. R. 608, where Duff, J., in the course of his judgment expressed the view that the necessity for excluding doubt contained in the rule as to the onus upon the prosecution in criminal cases might be regarded as an exception founded upon considerations of public policy. There can be no consideration of public policy calling for similar stringency in the case of an accused person endeavouring to displace a rebuttable presumption. SODEMAN (*supra*) has been considered by the Irish Court of Criminal Appeal in FENNELL (No. 1), [1940] Ir. R. 445. The judgment of the Court, delivered by Sullivan, C.J., does not purport to differ from the conclusion arrived at by the Privy Council; indeed, the reference to the decision in SODEMAN'S CASE (*supra*) concludes with the words "That seems a sound test to apply". The judgment, however, in FENNELL'S CASE (*supra*), as reported, so far as it relates to SODEMAN'S CASE (*supra*), is so inaccurate as to be misleading. It contains the following sentence (at p. 450): "The trial Judge in that case (which was from Australia) had directed the jury 'that the burden of proof of insanity that lay upon the prisoner was as strict and onerous as the burden of proof that lay on the Crown with regard to the facts which the prosecution had to establish'." In point of fact the trial Judge had given no such direction. What the Chief Justice is purporting to quote as the direction of the trial Judge was merely the argument of counsel for the appellant as to the effect of that direction, an argument not accepted by

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the Privy Council. FENNELL'S CASE (*supra*) cannot, we think, be regarded as any authority upon this point.

What is the burden resting upon a plaintiff or defendant in civil proceedings can, we think, best be stated in the words of the classic pronouncement upon the subject by Willes, J., in COOPER *v.* SLADE (1858), 6 H. L. Cas. 746, at p. 772. That learned Judge referred to an ancient authority in support of what he termed "the elementary proposition that in civil cases the preponderance of probability may constitute sufficient ground for a verdict". The authority in question was the judgment of Dyer, C.J., and a majority of the Justices of the Common Pleas in NEWIS *v.* LARK (1573) (Plowden, 412), decided in the reign of Queen Elizabeth. The report contains this passage: "Where the matter is so far gone that the parties are at issue . . . so that the jury is to give a verdict one way or the other, there, if the matter is doubtful, they may found their verdict upon that which appears the most probable, and by the same reason that which is most probable shall be good evidence."

In our judgment, in any case where, either by statute or at common law, some matter is presumed against an accused person "unless the contrary is proved", the jury should be directed that it is for them to decide whether the contrary is proved; that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt; and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish.

Conviction quashed.

Solicitors: J. C. H. Bowdler & Sons, Shrewsbury, for appellant; B. D. J. Hayes, Shrewsbury, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE LEWIS.

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Gaming—Card Game—Test of Illegality—Whether Game one of Mere Skill—Question one of Fact for Jury—Issue Treated by Judge as Question of Law for Him—Convictions Quashed—Gaming Houses Act, 1854 (17 & 18 *Vict. c.* 38), *s.* 4.

On a charge arising out of the use of premises for gaming with cards, contrary to section 4 of the Gaming Houses Act, 1854, the test of the legality of the game, in the case of a game not made unlawful by statute, is whether the element of chance in the game is so slight that it can be said to be a game of mere skill. The test applicable to other forms of gaming—for example, gaming with automatic machines—namely, whether skill is the dominant or governing factor, is not applicable to gaming with cards.

Dictum of HAWKINS, J., in JENKS *v.* TURPIN (1884), 13 Q. B. D. 505, at p. 516, followed and applied.

The question whether a particular game of cards is one of mere skill is an issue of fact for the jury, and, unless the evidence on this issue is all one way, must be left to the jury to determine.

Appeals against conviction.

The three appellants, Charles Henry Oliver Tompson, Frieda Poteliachow and Phœbe Harrison, were convicted at the County of London Sessions before the Chairman on December 17, 1942. The first appellant, as the owner, and the second appellant, as the occupier, were convicted respectively of permitting to be used and of using premises for unlawful gaming between October 8 and October 15, 1942. The third appellant was convicted of assisting in the conduct of the business. The first and second appellants were also convicted as persons having

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the care and management of the premises. The first and second appellants were each fined £50 and were each ordered to pay 50 guineas towards the costs of the prosecution, and the third appellant was fined £10.

Premises at 36 Finchley Road, N.W.8, were used as a club. The club had been first registered at other premises in 1933, and since September, 1939, had been carried on at the premises in question. The premises were used primarily as a poker and bridge club. The rules of poker as played at the club were proved, and police officers who had visited the club proved that on the material dates poker was being played in accordance with those rules, and also proved the several parts played by the appellants in the conduct of the club. The defendants desired to call evidence to show that skill predominated over chance in the game as played at the club, but the Chairman refused to leave that issue to the jury or to allow counsel to address the jury on it, ruling that the lawfulness or unlawfulness of the game as played at the club was a question of law for him. He allowed the defendants to call expert evidence with a view to influencing his own mind. After hearing the evidence, he directed the jury that poker as played at the club was an unlawful game, and the only issue which he left to the jury was the part played by each of the appellants in the management, etc., of the premises, on which there was no dispute.

Gilbert Beyfus, K.C. (*Christmas Humphreys* with him), for the appellants:

The Chairman applied the wrong test in ruling that the legality of the game of poker as played on the premises depended on whether the game was one of mere skill. If the jury were satisfied that skill preponderated, that was sufficient to entitle the appellants to an acquittal. Further, even if the test which the Chairman applied be regarded as the correct one, the question whether the particular game was one of mere skill was one of fact for the jury, not of law for the Judge. Unless

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the particular game is one made unlawful by statute, it is only in cases where the evidence is all one way that a Judge is entitled to direct a jury that the game in question is unlawful. Here the defence desired to call evidence on the degree of skill involved. If SALISBURY, [1939] 1 All E. R. 250, purported to decide the contrary, it is in conflict with a line of cases previously decided. [He referred to JENKS *v.* TURPIN (1884), 13 Q. B. D. 505; DAVIES, [1897] 2 Q. B. 199; BRACCHI BROS. *v.* REES (1915), 84 L. J. K. B. 2022; HENDRICK (1921), 15 Cr. App. R. 149; KIRBY AND OTHERS (1927), 20 Cr. App. R. 12.]

John Maude (*H. J. Hamblen* with him), for the Crown:

It is necessary to draw a distinction between gaming with cards and other gaming. "Carding" was made unlawful by the statute of 33 Hen. 8, which, so far as it relates to cards, was not repealed by the Gaming Act, 1845. Any game of cards consisting of mixed chance and skill is, therefore, unlawful if played in premises kept for the purpose. This appears clearly from the judgment of Hawkins, J., in JENKS *v.* TURPIN (1884), 13 Q. B. 505, at p. 524, which has never been dissented from in the long line of cases which have followed. The question of the lawfulness of a particular game is one of law for the Judge, and the Chairman was right in withdrawing this issue from the jury. [He referred to HENDRICK (*supra*); KIRBY AND OTHERS (*supra*); O.K. SOCIAL WHIST CLUB (1929), 21 Cr. App. R. 119 and SALISBURY (*supra*).]

Gilbert Beyfus, K.C., in reply:

No distinction has been drawn in any Act of Parliament between games of cards and other games of chance.

Cur. adv. vult.

May 25.—The judgment of the Court was read by:

LEWIS, J.: On December 17, 1942, the three appellants stood their trial at the County of London Sessions on an indictment containing four counts. In the first count all three appellants, namely, Charles Henry Oliver Tompson, Frieda

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Poteliachow, and Phœbe Harrison were charged for that, they being persons having the care and management of certain premises at 36 Finchley Road, N.W.8, those premises were being used for the purpose of unlawful gaming being carried on there on October 8 and other days between October 8 and October 15, 1942. In the second count Tompson was charged for that, he, being the owner of the said premises, permitted those premises to be used by Poteliachow for unlawful gaming on the aforesaid dates. On the third count Poteliachow was charged in that she used the said premises for unlawful gaming on the aforesaid dates. In the fourth count Harrison was charged for that she assisted in conducting the business of those premises, such premises being used for unlawful gaming on the aforesaid dates. All these charges were brought under section 4 of the Gaming Act, 1854, and to all of them the several appellants pleaded not guilty. The Crown offered no evidence against Harrison on the first count and she was accordingly acquitted on that count on the direction of the learned Chairman. On the other counts all the appellants were found guilty and were fined and ordered to pay sums by way of costs. The appellants now appeal against their convictions.

The premises were in fact conducted as a club which had been carried on since September, 1939, the club having been first registered at other premises in 1933. At this club poker and bridge were played and the premises were used primarily as a poker and bridge club. The rules of poker as played at the club were proved and certain police officers who had visited the club proved that on the dates in question poker was being played in accordance with those rules and the several parts played by the appellants at the club. In fact there was no dispute at all as to these matters.

Before this Court two grounds of appeal were argued by Mr. Beyfus: (1) that the learned Chairman in considering whether unlawful gaming was being carried on on the premises applied the wrong test, and (2) that in any event he was wrong in withdrawing the case from the jury so that, as it was put by

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learned counsel, the verdict was not the verdict of the jury, but the decision of the learned Chairman. In other words, the contention was that the learned Chairman was wrong in telling the jury that the question whether the game of poker as played in the club was an unlawful game was for him and for him alone, and that they must decide the case on the footing that the game was unlawful in the circumstances in which it was being played in the premises.

It seems to us that logically the second of these two contentions should be dealt with first and involves this question: Is it solely for the Judge to decide whether a game that is being played is an unlawful game, or is it for the jury to decide as a question of fact? What happened in this case was that the learned Chairman, after argument and a consideration of some of the authorities, held that the question whether the game of poker as played on the premises was a lawful or unlawful game was for him and not for the jury, and refused to allow the jury to consider that question at all, or to allow counsel to address the jury upon it, though he allowed evidence to be called by the appellants to show that skill predominated over chance, which counsel maintained in the circumstances of this case was the test as to whether or not the game was lawful. Such evidence was allowed to be called by the Chairman for the following reason, to quote his own words: "You may call experts with a view to influencing my mind, but I shall not allow you to address the jury on the question." After four expert witnesses had been called and cross-examined (their evidence being that the game of poker as played in this club was a game in which skill largely predominated over chance), the learned Chairman said: "I am quite satisfied that poker is not a game of mere skill and it is an unlawful game within the meaning of the statute and it follows from that that these premises were being used for unlawful gaming. I am also satisfied these are questions of law for me and I so direct the jury." He then summed up to the jury, telling them that the question as to whether poker as played in the club was an

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unlawful game was for him, and it was for him to decide whether premises were used for unlawful gaming. The only question which he left to the jury was one about which he quite rightly said there was no dispute, namely, the part each of the appellants played in the matter of managing the premises, permitting the premises to be used, or assisting in the conduct of the premises, respectively.

It is axiomatic that in a criminal trial all questions of law are for the Judge and all questions of fact are for the jury, and for a Judge to take upon himself to decide a question of fact, and having decided it to withdraw that question of fact from the consideration of the jury, is not in accordance with the law of England and in particular that branch of it dealing with the right of every man to be tried by a jury. In times like the present national emergency it may be thought right for the safety of the realm to make regulations having the authority of law which curtail the right to trial by jury, but for this reason it is the more important that nothing should be allowed, except such enactments, to diminish in any way the right of the subject to trial by jury.

There has been a considerable number of cases from time to time before the Courts of this country on the topic of unlawful gaming, and of the respective provinces of the Judge and jury in such cases, and it is not at first sight easy to reconcile the decisions. Some test has to be applied before it can be ascertained whether premises are being used for unlawful gaming in the sense of gaming therein at unlawful games, and it has been said "in using the words 'unlawful games', it is clear that the Legislature intended them to cover and include some games which being lawful in themselves were only made unlawful when played in particular places or by particular persons" (see *per* Hawkins, J., in JENKS *v.* TURPIN (1884), 13 Q. B. D. 505, at p. 516). That learned Judge pointed out in that case that since the Gaming Act, 1845, which repealed parts of the Act of 33 Hen. 8, c. 9, the only games unlawful *per se* were ace of hearts, faro, basset,

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hazard (see 12 Geo. 2, c. 28), passage (see 13 Geo. 2, c. 19), roulette (see 18 Geo. 2, c. 34), every game of dice except backgammon (see 13 Geo. 2, c. 19) and every game of cards which is not a game of mere skill. The preamble to the Gaming Act, 1845, as far as is material, reads as follows: "Whereas the laws heretofore made in restraint of unlawful gaming have been found of no avail to prevent the mischiefs which may happen therefrom, and also apply to sundry games of skill from which the like mischiefs cannot arise: Be it enacted, that so much of an Act passed in the thirty-third year of the reign of King Henry 8, intituled 'The Bill for maintaining artillery and the barring of unlawful games', whereby any game of mere skill, such as bowling, coyting, cloyshcayls, half bowl, tennis, or the like, is declared an unlawful game, or which enacts any penalty for playing at any such game of skill as aforesaid" shall be repealed. Dicing, tables or carding, which were included in the Act of Henry 8 as unlawful games, were not specifically included in the repeal. It follows from this that anyone who keeps premises for playing cards for money, although the card game is not a game specifically mentioned in the statutes above referred to, is guilty of unlawful gaming unless the game is one of mere skill.

The question whether a game is one of mere skill is, in our opinion, a question of fact. Indeed in the present case, by allowing witnesses to be called as to the amount of skill required to succeed at the game of poker, the learned Chairman treated it as a question of fact, although the evidence of these witnesses was directed to show that in the game of poker as played on these premises skill was the dominant factor and not that the game was one of mere skill in the sense of skill alone. Therefore, except in a case where the game in question is one that is made illegal by statute, we think that before a Judge can rule that a card game is unlawful a question of fact has to be decided by a jury, namely, is the game one of mere skill or not. The jury having found that the game is not one of mere skill on the evidence called before them, then it is for

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the Judge to say that the game is an unlawful game, and if that game is being played on premises habitually used for such purpose those responsible for the conduct of those premises are guilty of unlawful gaming. The proper course, in the opinion of the Court, is that a jury should be asked to give a general verdict of guilty or not guilty after the Judge has directed them that the question for their consideration is whether or not on the evidence before them they are satisfied that the game is or is not one of mere skill. If they think that the game is one of mere skill, then the defendants are entitled to be acquitted, as persons who use premises for the purpose of games of mere skill being played therein are not guilty of unlawful gaming. To adopt any other course would seem to be dictating the verdict of a jury instead of leaving the jury to find their own verdict on the facts, a course deprecated by the Court in HENDRICK (1921), 15 Cr. App. R. 149, at p. 155. In BRACCHI BROS. *v.* REES (1915), 84 L. J. K. B. 2022, which was an automatic machine case, the question whether a game was a game of skill or chance was clearly stated to be a question of fact. The Lord Chief Justice (Lord Reading) in that case said (at p. 2024): "In my view it must be a question of fact in all these cases whether a particular game is or is not a game of chance", and Ridley, J. said (at p. 2024): "To which class (*i.e.*, whether skill or chance) a game belongs is a question of degree". Reliance was placed by counsel for the Crown on a passage in the judgment of the Lord Chief Justice (Lord Russell of Killowen) in DAVIES, [1897] 2 Q. B. 199, at p. 202, a passage frequently quoted in these cases. The passage is as follows: "But, further, it appears that the jury were asked whether the house was used for unlawful gaming, and whether the game of German bank as played there was an unlawful game. These questions, however, are questions of law for the Judge and not of fact for the jury, who must apply the facts to the definition of the law given by the Judge; here there seems to be no direction as to the law in the summing-up." In that case the real contest was whether or not four

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friends who sat down in a private house (the house of one of them) on one occasion only, and, after playing whist, played a game of German bank, could be convicted of using the house or room for the purpose of unlawful gaming being carried on therein. Lord Russell of Killowen emphatically stated that on that evidence, in his opinion, it was monstrous to say that the case fell at all within the mischief or within the provisions of the statute which was intended to prevent the user of the house as a gaming house. As was pointed out in JENKS *v.* TURPIN (*supra*) by Hawkins, J., at p. 516, a person is not guilty of keeping a gaming house, *i.e.*, using a house for unlawful gaming, unless the house is one to which persons are invited habitually for the purposes of gaming. The view expressed by Lord Russell of Killowen on this point in DAVIES (*supra*) was sufficient to justify the quashing of the conviction, there being no evidence in that case that the premises were used for the purpose of unlawful gaming. The other passage quoted above from his judgment, a judgment concurred in by Hawkins, Grantham, Wright, and Collins, JJ., was not necessary for decision in that case. But, however that may be, in our view the concluding words of the passage above quoted make it clear that it is for the jury to find the facts on a proper direction on the law from the Judge and that if there are facts to find before a jury can return a verdict it is for the jury and not for the Judge to find those facts. In HENDRICK (1921), 15 Cr. App. R., at p. 154, Avory, J., in commenting on the case of MORRIS *v.* GODFREY (1912), 28 T. L. R. 401, pointed out that the Divisional Court in that case upheld the decision of the magistrate (who was the Judge of both law and fact) upon his finding of the facts. The magistrate in that case had found that on the facts the game of progressive whist on the evidence before him was a game in which chance predominated over skill, which was equivalent to saying it was not a game of mere skill, and therefore in law was a game the playing of which in premises week by week, throughout the

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winter season, rendered the occupier of such premises guilty of unlawful gaming.

For a Judge to take upon himself the duty of finding the facts and on the facts so found by him to direct the jury that they must convict is to dictate the verdict to the jury instead of leaving the jury to find their own verdict on the facts as found by them after a proper direction on the law. In any criminal case the Judge has, no doubt, a right and a duty to withdraw from a jury an issue upon which there is no evidence, but except in such a case every question of fact upon which there is evidence is within the province of the jury and it is for the jury to come to a conclusion upon it after a proper direction from the Judge. Similarly, a Judge has a right and a duty to point out to a jury that the evidence before them is " all one way " and they cannot find if they accept the uncontradicted evidence a particular verdict. LARKIN (1942), 29 Cr. App. R. 18; [1943] 1 K. B. 174, is an example of this, where Oliver, J., on the evidence given told the jury that they could not find a verdict of not guilty, but that it was a case of murder or manslaughter, and even if they accepted the prisoner's evidence to the full the verdict must be one of manslaughter. In KIRBY AND OTHERS (1927), 20 Cr. App. R. 12, it was contended on an appeal from a conviction for unlawful gaming (in an automatic machine case) that the learned Recorder had usurped the functions of the jury in telling them in effect that they must convict. In that case the facts were apparently not in dispute and the appeal failed. In the judgment of the Court delivered by the Lord Chief Justice (Lord Hewart) there appears this passage (at p. 17): " In the present case the facts were all one way. In our opinion, therefore, there was no evidence upon which the jury might not properly convict, nor is there any ground for saying that the learned Recorder failed adequately to explain the matter to the jury in his summing up or usurped to himself the functions to be performed by the jury." In that case evidence was called to show that the game was a game of chance and

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no evidence was called at the trial on behalf of the appellants. In O.K. SOCIAL AND WHIST CLUB, LTD. (1929), 21 Cr. App. R. 119, in which case the appellants were convicted before the Recorder of Liverpool of keeping a common gaming house, the game in question being progressive whist, in which, as Lord Hewart pointed out, the partners as well as the cards were shuffled, it was argued for the appellants that the Recorder adopted a wrong method in telling them it was impossible for them to hold that whist as played in this club was a game of skill. All that the Court of Criminal Appeal decided in that case was in effect that the evidence being all one way, the game involving as it did at every turn the element of chance and multiplying and confusing the element of chance by the progression of the partners throughout the evening, the Recorder was not guilty of an error in law when he told the jury that on the evidence before them it was impossible for them to hold that progressive whist as played in the club was a game of skill. In BRENNAND AND OTHERS (1930), 22 Cr. App. R. 95, the only evidence before the Court was that the automatic machine in question in that case, known as the Little Stockbroker, was a game of chance, and as was said by Avory, J., at p. 99, " the persons who use this machine drop pennies into the machine and take their chance of something coming out ", and " the description given to us seems to suggest that anyone who wanted to make a certainty of winning would have occupied the machine for a great part of the day to the exclusion of all other people ". In this case again the evidence was all one way, the Court holding that there was no ground for complaint that any question of fact which was left open was not left for the determination of the jury. Similarly, in SALISBURY, [1939] 1 All E. R. 250, the Court again held that, where the evidence was all one way, no witness having been called for the appellants to controvert the evidence given by the prosecution that the game of Fascination was one of chance, the learned Chairman of the London Sessions was right in holding as a matter of law that the game was unlawful, the

element which constituted the unlawfulness of the game—that the game in fact was a game of chance—not being disputed. The Court is, therefore, of opinion that, although it is for the Judge, and for the Judge alone, to decide whether, on given facts, a game is unlawful, it is for the jury to find whether or not the elements which go to make that game unlawful are proved, that is to say, in the case of a card game whether or not the game is one of mere skill.

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With regard to the other point raised by Mr. Beyfus, namely, that the learned Chairman applied the wrong test of unlawful gaming, we are of the following opinion. We have already pointed out that, although it is for the Judge, as a matter of law, to define to the jury what is an unlawful game, it is for the jury to find the facts and to draw the inferences of fact, which, when ascertained, constitute a game unlawful when played in premises habitually used for that purpose.

In respect to a game of cards, the test was quite clearly laid down in the year 1884 by Hawkins, J., in JENKS *v.* TURPIN, 13 Q. B. D., at p. 524. We refer particularly to the following passage in the judgment in that case: "Since that statute (namely, 8 & 9 Vict. c. 109) the only games made unlawful by 33 Hen. 8, c. 9, are games of dice or cards, whether such games were known at the time of the passing of that statute or have been since invented. All such games, if they are games of chance, or games of chance and skill combined (which cannot be called games of *mere* skill) are, in my opinion, clearly within the meaning of the words 'unlawful games' in 17 & 18 Vict. c. 38. The language of the first section of 8 & 9 Vict. c. 109, in referring to 33 Hen. 8, c. 9, and repealing only so much of it as applies to games of skill, is a strong indication of the intention of the Legislature that all the other games mentioned in the statute of Hen. 8 were to continue to be treated as unlawful in the sense in and to the extent to which they were made unlawful by that statute, namely, unlawful if played in a house kept for playing at them. The *unlawful* games, then, now are—ace of hearts, pharaoh, basset, hazard, passage,

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roulette, every game of dice except backgammon, and every game of cards which is not a game of *mere* skill, and, I incline to add, any other game of mere chance. Does baccarat come within this category? The description of the game given by Mr. Russell satisfies me that it does. It is a game of cards. It is a game of chance, and though, as in most other things, experience and judgment may make one player or banker more successful than another, it would be a perversion of words to say that it was in any sense a game of mere skill. It is therefore, in my opinion, an unlawful game within the meaning of the statute."

That decision has never been questioned. That test was applied by the Divisional Court in 1938 in DALTON *v.* ADELPHI CLUB, LTD., [1938] 4 All E. R. 556. Lord Hewart, in delivering the judgment of the Court in that case, in which the question of the user of certain premises for the purpose of playing stud poker was under consideration, on a case stated by a metropolitan magistrate, said: " Whatever the degree of skill an experienced player at stud poker may acquire, that game, as described in the case, must always remain a game of chance, and, in the language of Hawkins, J., with respect to baccarat, it would be a perversion of words to say that it was in any sense a game of mere skill." The Lord Chief Justice pointed out that in any case the magistrate had not been asked to find that the game was one of mere skill. " Any such finding ", he says, " would have been obviously absurd ", the magistrate having merely expressed the opinion that, upon the evidence, the game of stud poker was a game of skill. The case was sent back to the magistrate with a direction to find that the charges against the respondents were proved.

Bearing in mind that all games of cards are made unlawful by statute and that the Gaming Act, 1845, did not repeal specifically that part of the statute of 33 Hen. 8 which dealt with " carding ", we are of opinion that the proper question for a jury, when dealing with a game of cards, is: Is this a game of skill, *i.e.*, a game in which the element of chance is so

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slight as to render the game one which can properly be said to be a game of mere skill?

We were referred in argument to many of the decisions in the "automatic machine" cases. In the year 1903, in FIELDING *v.* TURNER, [1903] 1 K. B. 867, the Divisional Court considered a case involving the use of an automatic machine. The working of this machine was thus described in the case—a person desiring to work the machine puts a penny in the slot and then pulls down a spring by means of a knob and then lets the knob go suddenly and the spring flies up and the penny is thus sent on its journey and may go into one of seven compartments. If it goes into either of two compartments, the penny is returned to the sender; if it goes into one of four compartments, the penny is retained in the machine and the sender gets nothing for it. If the penny goes into the centre compartment—the bull's eye, as it is called—the sender receives from the machine a ticket entitling him to receive from the appellant twopenny worth of sweets or it may be cigarettes or cigars. It was proved that on the day in question a number of boys and some men put pennies into the machine with varying fortunes, sometimes winning and more often losing. In cross-examination some of the boys who gave evidence admitted that there was some skill in working the machine and that a person who was accustomed to the game won as often as he lost. The appellant was convicted of unlawful gaming by the justices. On appeal, the Court, consisting of the Lord Chief Justice (Lord Alverstone), Wills and Channell, JJ., held that the conviction was right, and in giving the judgment of the Court, Lord Alverstone said, at p. 871: "It was argued before us that the conviction was wrong on the ground that there was no evidence of unlawful gaming within the section. The first ground on which this contention was founded was that, if a game at all, the use of the automatic machine in question constituted a game of skill. We are clearly of opinion that this contention cannot be maintained. In the proper sense of the word, skill has no effect upon the act done by the person who

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puts the penny into the slot. No doubt continuous practice with the same machine might enable a person to acquire knowledge as to the strength of the particular spring, and thereby enable him to be more successful in making the penny fall into the centre compartment than in the case of a person who had not the same practice of the machine. On the first, and, probably, on many occasions, it is a pure question of chance into which compartment the penny will fall; no aim can be taken, and it is not unimportant to observe, in connection with another part of the case, that there are four compartments into which it can fall with no return to the person inserting it, as against one into which, if the penny falls, it will enable the person inserting it to receive a ticket of the nominal value of 2d." From this it would appear that, although there might be a certain amount of skill acquired by practice, the game was one of chance and the Court decided that that game was not a game of skill.

In PESSERS, MOODY, WRAITH & GURR, LTD. *v.* CATT (1913), 77 J. P. 430, the defendant sought to escape from his obligation to pay rent which he had agreed to pay to the plaintiffs for the hire of certain automatic machines on the ground that he was induced to enter into the agreement by a representation and a warranty that the defendant might lawfully invite the public to use the machines, and that such user of the machines constituted a game of skill, and further, in the alternative, that the agreement was null and void in that the machines were let to him to be used in various places for the purposes of unlawful gaming and wagering. Scrutton, J., held the game was one of skill (a conclusion previously come to by Eve, J., on a motion for an interlocutory injunction) and gave judgment for the plaintiffs. That decision was upheld on appeal. Vaughan Williams, L.J., said (at p. 429): "There is, I suppose, some skill in this game. Both Eve, J., and Scrutton, J., thought so. I think the amount of skill ought to be taken into consideration, even if it were what I should call a scintilla of skill, but in this case I think there was some skill and I should say that

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there was more than a scintilla of skill. I shall not trouble myself with any definitions." Kennedy, L.J. said (at p. 430), after referring to FIELDING *v.* TURNER (*supra*) and THOMPSON *v.* MASON (1904), 68 J. P. 270: "It seems to me that in this case there is what I may call a governing element of skill in the use of the cup, which can, whenever the ball falls, skilfully used, catch that ball. Of course, the degree of skill and, therefore, the success, will depend to some extent upon practice, and with practice, to a person with a good eye who is using the movable bar to which the cup is attached, it would be possible, I should imagine, if he were a skilful person, to catch it every time. Therefore, the test as to success or failure seems to me, in this case, to be one of skill and not of chance. That is the dominant element, and, being so, I think the judgment which has been pronounced below, and is in accordance with that of Eve, J., was right, and that this appeal should be dismissed." The learned Lord Justice applied the test of the dominant factor and not the test of mere skill. In subsequent automatic machine cases, the test there suggested by Kennedy, L.J., has been adopted.

Since the year 1913 the Courts, in automatic machine cases, have taken as a test, not whether the game is one of mere skill, but whether or not the proportion of skill to chance is such as to establish that skill is the dominant or governing factor in the game. That test has never been applied to games of cards, and in our opinion rightly so, because, as was pointed out by Hawkins, J., in JENKS *v.* TURPIN (*supra*), there is a distinction between card games which by statute are unlawful unless they are games of mere skill, and such games as those played with automatic machines which are not unlawful unless they are games of mere chance and become mere instruments of gaming.

It appears, therefore, that in the present case the learned Chairman applied the right test, namely, is this game a game of mere skill. He said: "I am quite satisfied that poker is not a game of mere skill and is unlawful." The error which he made was, in our opinion, in not leaving to the jury the

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question whether on the evidence called, the game was a game of mere skill, and telling them that if they found it was, they should acquit, and if not, they should convict.

Upon that ground we think that these convictions must be quashed.

Convictions quashed.

Solicitors: Claude Hornby, Dodds & Co., for appellants; Solicitor for Metropolitan Police, for respondent.

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CLARENCE LEES DYSON.

Previous Convictions of Prisoner—Justices Dealing with Indictable Offence—Desirability of Evidence being Submitted in Writing.

It is worthy of consideration whether, when evidence of previous convictions of a prisoner has to be submitted to justices dealing with an indictable offence, such evidence should be submitted in writing rather than given *viva voce* in open Court.

Appeal against conviction.

The appellant was convicted at Huddersfield Borough Quarter Sessions on April 12, 1943, of larceny and was sentenced by the Recorder to eighteen months' imprisonment with hard labour.

At the trial the appellant did not set up any defence, gave no evidence and called no witnesses. He appealed on the ground that, when he was before the justices who committed him for trial, a list of his previous convictions, some forty in number, was read out in open Court and subsequently published in a local newspaper.

No counsel appeared on either side.

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ASQUITH, J.: The appellant was convicted at Huddersfield Borough Quarter Sessions of larceny, and was sentenced to eighteen months' imprisonment with hard labour. He now seeks to appeal against the conviction on a point of law.

The evidence in the case was very short, and really overwhelming. A shop assistant at Messrs. Marks & Spencer's gave evidence that she saw the appellant take away a number of socks from the counter, put them under his coat and leave without paying for them. Then she and a colleague followed the appellant into the street and caught him up, and it was then discovered that he had the pile of stolen socks under his coat. If the matter had rested there, there would have been nothing more to be said. The appellant set up no defence, did not give evidence and called no witnesses. However, the point of law which he takes is that when the case was before the justices who committed him for trial, a list of his previous convictions—some forty in number—was read out to the justices, and was also published in a local newspaper.

The justices were entitled, if not actually bound, to receive such evidence. The decision in SHERIDAN (1936), 26 Cr. App. R. 1, at p. 7, deals with the matter in the following passage: "Some comment was made in the course of the argument upon the *dicta* of Avory, J., [1911] 1 K. B., at p. 624, in the HERTFORDSHIRE JUSTICES' CASE, as to the right of justices to inquire into the character and antecedents of the person charged before deciding to convict. The language of section 12 of the Summary Jurisdiction Act, 1879, the statute then in force, is somewhat different from that used in section 24 of the Criminal Justice Act, 1925. A consideration of subsection (1) of the latter section makes it plain, in our view, that justices are now required, as a preliminary to any decision as to dealing summarily with an indictable offence, to hear and to take into consideration certain matters specified in the section, one of them being the character and antecedents of the accused, to

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enable them to decide whether they ought to deal with the case summarily. Such a course does not appear to involve any unfairness to the accused". Nevertheless, there are always risks that a defendant's previous record may, either through being read out in Court or, as in this case, through being published in a local newspaper as well, become known to the trial jury, and prejudice his case before them. It might be worthy of consideration whether, when such evidence is given before justices dealing with an indictable offence, it should not be submitted in writing, instead of being recited *viva voce*. In the present case, the additional fact that the previous offences were broadcast in one organ, at any rate, of the local Press seems to us a most unfortunate complication, and in our view, in the special circumstances of this particular case, the appeal ought to be allowed and the conviction quashed.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ASQUITH AND MR. JUSTICE CASSELS.

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CHARLES REGINALD BROWNE.

Evidence—Calling of Witness by Judge—Summing-up Concluded—Request by Jury before Retirement for Medical Evidence—Refusal by Judge—Request Repeated on Return into Court before Verdict—Prison Doctor Called—Conviction Quashed.

On a charge of obtaining money by false pretences, the defendant put forward the defence that he was at the material time suffering from loss of memory. No medical evidence was called either by the prosecution or the defence, but the defendant replied, in answer to a question by the Chairman, that he had been examined by the prison doctor while in custody awaiting trial. After the summing-up, the jury, before they

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retired, requested that medical evidence on the defendant's mental condition should be called, but the Chairman declined to accede to the request. The jury retired to consider their verdict, and on returning into Court repeated their request for medical evidence. The Chairman then, despite a protest from defending counsel, called the prison doctor, who gave evidence. The jury convicted the defendant.

Held that, in view of the irregularity of a witness being called by the Judge at that stage of the trial, coupled with the fact that the summing-up was inadequate, the conviction must be quashed.

Appeal against conviction.

The appellant was convicted at Hampshire Quarter Sessions on April 19, 1943, of obtaining money by false pretences and was sentenced by the Chairman to twenty months' imprisonment.

The appellant had stated in his evidence that at the time of the offences charged he was suffering from loss of memory. No medical evidence was called either by the prosecution or the defence, but the defendant was asked by the Chairman whether he had been medically examined while in custody awaiting trial, and replied: "Yes." After the summing-up, the jury, before they retired, expressed a desire to hear medical evidence from the prison doctor on the appellant's state of mind. The Chairman declined to accede to the request, but on its being renewed by the jury on their return into Court, decided, despite a protest from defending counsel, to call the prison doctor, who gave evidence.

The material portions of the summing-up appear in the judgment.

G. W. Willett, for the appellant:

The summing-up was defective, in that the jury were never directed on the meaning of the word "fraudulent" or the essential ingredients of the offence of obtaining money by false pretences, and were, in effect, directed to convict. Further, the calling of the prison doctor by the Chairman after the

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conclusion of the summing-up was irregular, and contrary to a line of decided cases.

G. R. F. Morris, for the Crown:

The summing-up was not entirely satisfactory, but the jury were directed that they must be satisfied by the prosecution on the question of fraud. It was not desirable that the prison doctor should have been called by the Chairman at so late a stage in the trial, and in ordinary circumstances the procedure would be quite irregular; but the position may be somewhat different where the jury specifically desire to hear a witness to assist them on a matter which has arisen for the first time in the course of the defence. In any event, even if the calling of the witness was irregular, the evidence for the prosecution was overwhelming, and it is submitted that this is a case where the Court might apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907.

CASSELS, J.: This appellant was convicted at the Hampshire Quarter Sessions on two counts charging him with obtaining money by false pretences with intent to defraud. He was charged with obtaining on March 9, 1942, £5 from a bank at Brockenhurst, and with obtaining on March 15 £5 from another bank at Lyndhurst. The false pretence which was alleged, and of which evidence was given, was that he represented that he had an account at another bank.

At the trial the usual type of evidence was given, first that the representation was made and that money was paid, and then that the appellant had no account at the bank where he was representing that he had an account. It was a plain, simple, ordinary case of obtaining money from a bank by means of a worthless cheque, with intent to defraud, and called for a plain, ordinary summing-up to a jury. They should have been directed on what amounted to a false pretence, and what had to be proved in such a case, and what amounted to intent to defraud. After such a summing up a jury would without

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any difficulty have arrived at a conclusion whether or not the case had been made out by the prosecution.

Unfortunately, the case seems to have created such an atmosphere in the course of its trial, according to Mr. Morris, who has represented the Crown here to-day, and has done his best to support the summing-up and the verdict, that everybody had come to the conclusion that there really was no defence in this case, and that there was nothing for the jury to do except to bring in a verdict of guilty. The Chairman, in addressing them on the main issue, whether an intent to defraud had been established, said this: "On the face of it, this would appear to be a systematic and ingenious and deliberate fraud; there can be no two ways about that." Then, a little further on, having gone briefly through the facts, he said this: "On the face of it, that is just about as clear and positive a case of obtaining money by false pretences as you could possibly have."

Cases of this kind, after all, are for the jury, and are not for the Judge who tries them. The jury were entitled to have a proper direction upon the most important part of a case of this kind, namely, what is the legal significance of the offence, and what has to be established by the evidence in order that the jury should be satisfied that the proper verdict is one of guilty. It is true that in the course of the summing-up, which was very short, the Chairman said: "You have to be satisfied by the prosecution that what he said was fraudulent." When one reflects upon the difficulty of finding a completely satisfactory definition of the word "fraudulent", and when one realises how important it is that a jury should understand that the fraud in such a case must be of such a nature that it amounts to the crime of obtaining goods, or something, by false pretences, and inducing a person to act on that pretence, and that there must be an intent to swindle, it will be seen how vital is the omission. There is not a word about that; the word "fraudulent" was simply left high and dry, and the jury were left to guess what it meant. We have, therefore, come to the

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conclusion, so far as the most important part of the summing-up is concerned, that it was lacking in that direction which was most essential in such a case.

Reference must, however, be made to another matter which occurred in the course of the trial. After the conclusion of the case for the prosecution the defendant gave evidence and the last question which was put to him by the Chairman was: "I only want to ask you this: Have you been medically examined recently in the prison?", and the defendant said "Yes." That question arose for two reasons. First, it was stated by the defendant that he was suffering, by reason of his past experiences, from loss of memory. Secondly, the Chairman, we are told, had before him the report of the prison doctor. From the nature of the offence one would find it difficult to see any reason why the Court should be provided with a medical report, but while the appellant had been in custody awaiting trial he had, it was said, been suffering from loss of memory. His wife had been to see him, and it was suggested that he was unable to recognise her, and that he was really not quite responsible for any of these things because he had no memory, and therefore there was no intent to defraud.

Before the jury retired to consider their verdict, the foreman said: "Have you any doctor's statement with regard to his mental condition?" The Chairman adopted a very proper attitude, and replied: "I do not think it is for me to call medical evidence or for the jury to call for it. He is defended by counsel, and if counsel thought it would have done his case any good, I think he would have called medical evidence." Mr. Willett (defending counsel) then said: "The jury will, of course, appreciate that the only medical evidence that was available to call was the prison medical officer." That had already come out in the case. Then the jury retired to consider their verdict, and were away less than a quarter of an hour. On returning the foreman said: "As so much hangs on the accused's mental condition, may we have medical evidence from the prison doctor as to the accused's state of mind at the

time his wife first interviewed him, that is, when she said he did not recognise her? ", and the Chairman said: " Very well, we will call the doctor." Then Mr. Willett, knowing his law, and knowing that there were cases which dealt with this point, said: " From the point of view of propriety in this matter, I submit that there is no power in the Court to hear evidence after the whole case has been closed." The transcript then reads: " (The Chairman:) On what grounds do you say that? (Mr. Willett:) I know of no grounds on which one can call further evidence after the summing-up. (The Chairman:) At the request of the jury I am calling Dr. Christie. If I am making a mistake, you have your remedy." The medical officer was called and gave evidence, which undoubtedly was evidence for the prosecution, and was calculated completely to answer any suggestion which had been made by the appellant or his wife that the appellant was suffering from anything. He said that there was no medical term which could be in truth attached to the appellant; that he was not suffering from any loss of memory and was not suffering from anything. Mr. Willett cross-examined him, and then the jury just put their heads together for two minutes and intimated that they were agreed. They returned the verdict " Guilty, with recommendation to mercy ", to which the Chairman replied: " But I think you will be surprised by some of the things you will hear."

The point which has to be considered by this Court is: Was this a satisfactory trial? We have come to the conclusion that it was not. A little regularity about the conduct of criminal proceedings and trial by indictment is not unbecoming. It is not right to regard the procedure as being in the nature of a committee of inquiry, where one member of the committee after another gets up and makes various suggestions, and at various intervals people are called in to give evidence. There is a stage for the evidence of the prosecution. There is a stage for the evidence of the defence. Then there is a stage for the summing-up, and it is wrong, as has been laid down by

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this Court before now, for evidence to be called at the end of a case when all the evidence available has been provided for the consideration of the Court. It is wrong for evidence then to be put before the Court, unless it comes within certain well-recognised principles. If the prosecution in this case desired to call the prison doctor, they should have applied at the end of the defence, and the Chairman should have ruled that the evidence was or was not admissible. Counsel for the defence, having had notice of that evidence, might well have objected to such an application. Instead of that the Chairman, on his own responsibility, chose in a case of this kind to call the prison doctor, after the summing-up and the retirement of the jury, to give evidence to contradict suggestions which had been made on behalf of the appellant, that he was suffering from loss of memory. Whether he was suffering from loss of memory or not, is not for this Court to decide. What this Court has to decide is: Was this a satisfactory trial? Did the jury arrive at a proper conclusion upon properly admitted evidence? A jury is sworn to give a verdict according to the evidence. It is not sworn to give a verdict according to any suggestions or propositions which may have been followed up in the course of the trial. This jury had evidence for the prosecution, then evidence for the defence, then more evidence for the prosecution, and in addition to that listened to an inadequate summing-up.

In all those circumstances, this Court has come to the conclusion that this conviction cannot stand. It was suggested that we might put into operation the proviso to section 4 (1) of the Criminal Appeal Act, 1907. The proviso says: "Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred." This Court cannot say that no substantial miscarriage of justice has occurred. If this had been a regular

trial, with the recognised procedure properly observed, it may well be that the jury would have had a doubt, and would have said: "We are not quite satisfied." We cannot be certain on the material before us that in any circumstances the jury would have returned a verdict of guilty. We have, therefore, come to the conclusion that this conviction cannot stand, and it is accordingly quashed.

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Conviction quashed.

BEFORE

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Murder—Provocation—Issue of Manslaughter Withdrawn from Jury—Conviction Affirmed.

Conviction of murder affirmed in a case where the Judge had withdrawn the issue of manslaughter from the jury on the ground that there was no evidence of provocation.

Observations on the kind of matters to be looked for as affording evidence of provocation.

THORPE (1925), 18 Cr. App. R. 189, and MANCINI *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 28 Cr. App. R. 65; [1942] A. C. 1, followed.

Appeal against conviction.

The appellant was tried before Humphreys, J., at Sussex Assizes in July, 1943, for the murder of Annette Pepper. The jury disagreed, and he was re-tried before Oliver, J., at the Central Criminal Court. On July 26, 1943, he was found guilty and sentenced to death.

The appellant was a French Canadian soldier, aged twenty-five. In January, 1943, when stationed at Lancing, he met

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Mrs. Annette Pepper, the wife of a British prisoner of war, and formed an adulterous association with her, and from March 6 to 12 lived with her at her home at Portslade. On March 13 another Canadian soldier, a sergeant, who had been on intimate terms with Mrs. Pepper during the winter of 1941–2, went to Portslade to look for her. On March 15 he met the appellant, and they had a conversation about Mrs. Pepper, which the sergeant said was not a friendly one, but it was arranged that they should meet at Mrs. Pepper's house in the evening. Mrs. Pepper desired that the appellant should return to Lancing and leave her to spend the evening with the sergeant, but the appellant refused to do this. About 8 p.m. the appellant went to the Old Brewery, where there was a Canadian guard and on the roof of which was a Bren gun. He inquired of the corporal in charge about ammunition, carried the gun away with the magazine loaded, and hid it in a field opposite Mrs. Pepper's house. About 9.30 p.m. he walked across to the house, went inside and sat down in a room where Mrs. Pepper and the sergeant were. In the kitchen (according to the appellant's own statement) Mrs. Pepper said that she did not like the appellant and loved the sergeant, and asked the appellant to go. The appellant then slapped her face and she slapped his. The appellant then left saying: "I go, but you know what is going to happen". The appellant went outside, picked up the gun to see if it was ready for firing, carried it to the front door and knocked. A woman named Mrs. Webb opened the door, and on seeing the gun closed the door in the appellant's face. The appellant then fired at the door, and bullets went through, one of which injured the sergeant. The appellant then carried the gun to the back of the house and entered through the back door. He called on Mrs. Pepper, who was upstairs, to come down. She asked him for his word of honour that he would not shoot, to which he replied: "Yes, come down at once". The appellant saw her coming downstairs and fired. She slipped down and he fired again, killing her immediately. He

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put the gun at the back of the sitting room and removed the magazine which he placed on Mrs. Pepper's dead body. He then ran out of the house and was stopped in the road by a member of the Home Guard. There was evidence that he said when stopped: "It was a Bren; I did not mean to miss. Take it easy; I have done what I wanted to do. I took the gun up there, but I never thought of killing her".

The appellant gave evidence at the trial and said in cross-examination that he was very much upset and very jealous of the sergeant, that he was angry when the sergeant talked to him during the afternoon as if he (the sergeant) were Mrs. Pepper's husband, and more angry when Mrs. Pepper told him (the appellant) to go, and that he then went and got the gun from the field where he had hidden it. No other evidence was called for the defence.

At the close of the appellant's evidence Oliver, J., told defending counsel that he should direct the jury as a matter of law that there was no evidence on which they could possibly find a verdict of manslaughter on the ground of provocation. Counsel accordingly refrained from submitting to the jury the possibility of a verdict of manslaughter.

Eric Neve, K.C. (*Dutton Briant* with him), for the appellant:

The Judge was wrong in withdrawing the issue of manslaughter from the jury and in refusing to allow counsel to address them on that issue, as there was sufficient evidence of provocation in Mrs. Pepper's conduct towards the appellant. [He referred to THORPE (1925), 18 Cr. App. R. 189, and MANCINI *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 28 Cr. App. R. 65; [1942] A. C. 1.]

Sir Charles Doughty, K.C., and *H. J. Hamblen*, for the Crown, were not called on to argue.

CASSELS, J., after stating the facts: The appeal is now brought to this Court on the ground that counsel should have

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been allowed to address the jury on manslaughter as a possible verdict because there was evidence of provocation for their consideration.

The law has been very clearly laid down in a series of cases in this Court, and in one case in the House of Lords, MANCINI *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 28 Cr. App. R. 65; [1942] A. C. 1, which is the most recent authority upon this matter. The Court desires to draw attention to three short passages in the speech of the Lord Chancellor (Viscount Simon). He said (28 Cr. App. R., at p. 73; [1942] A. C., at p. 8): "The possibility of a verdict of manslaughter instead of murder only arises when the evidence given before the jury is such as might satisfy them as the judges of fact that the elements were present which would reduce the crime to manslaughter, or, at any rate, might induce a reasonable doubt whether this was, or was not, the case". Later (28 Cr. App. R., at p. 74; [1942] A. C., at p. 9) he said: "It is not all provocation that will reduce the crime of murder to manslaughter. Provocation, to have that result, must be such as temporarily deprives the person provoked of the power of self-control, as the result of which he commits the unlawful act which causes death". He then cited Stephen's *Digest of the Criminal Law*, article 317: "In deciding the question whether this was or was not the case, regard must be had to the nature of the act by which the offender causes death, to the time which elapses between the provocation and the act which caused death, to the offender's conduct during that interval, and to all other circumstances tending to show the state of his mind". Then the Lord Chancellor went on to say: "The test to be applied is that of the effect of the provocation on a reasonable man, as was laid down by the Court of Criminal Appeal in LESBINI (11 Cr. App. R. 4; [1914] 3 K. B. 1116), so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular impor-

tance (a) to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (b) to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter" Later in his speech (28 Cr. App. R., at p. 77; [1942] A. C., at p. 12) the Lord Chancellor said: "The language employed by Lord Sankey" [in WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 25 Cr. App. R. 72; [1935] A. C. 462] "does not assert and does not imply that in every charge of murder, whatever the circumstances, the Judge ought to devote part of his summing-up to directing the jury on the question of manslaughter or the jury ought to consider it. If the evidence before the jury at the end of the case does not contain material on which a reasonable man could find a verdict of manslaughter instead of murder, it is no defect in the summing-up that manslaughter is not dealt with. Taking, for example, a case in which no evidence has been given which would raise the issue of provocation, it is not the duty of the Judge to invite the jury to speculate as to provocative incidents, of which there is no evidence and which cannot be reasonably inferred from the evidence. The duty of the jury to give the accused the benefit of the doubt is a duty which they should discharge having regard to the material before them, for it is on the evidence, and the evidence alone, that the prisoner is being tried, and it would only lead to confusion and possible injustice if either Judge or jury went outside it".

It is necessary to refer only to one other case, THORPE (1925), 18 Cr. App. R. 189. The Lord Chief Justice (Lord Hewart) said (at p. 191): "If there is no evidence on which a verdict of manslaughter can properly be found it is the duty of the Judge not to leave the question of man-

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slaughter to the jury, but if there is evidence, then it is the duty of the Judge to leave the question to the jury, notwithstanding that it has not been raised by the defence, and is inconsistent with the defence which is raised ".

That being the law, the question to be considered in this case is: Was there a scintilla of evidence which could have been or should have been left to the jury? What are the suggested elements of provocation in this case which, according to the contentions put forward on behalf of the appellant, should have been left to the jury? That the appellant's reason was dethroned (a not unfamiliar phrase in the forensic arena) because the woman whom he had adulterously known for two months desired to resume intimate companionship with another man whom, for that night at any rate, she preferred to the appellant. That annoyed the appellant; that made him angry and that aroused the feeling of jealousy. What is jealousy? It has been defined as " apprehensive of being displaced in the love of another ", and " fear of being supplanted in the affection of a lover ". It is not an unknown motive for murder, but motive is not provocation. A man may conjure up a motive or reasons sufficient for himself to cause him to kill, but it does not follow that that provides evidence of provocation. Motive is not provocation, and it only creates confusion if it is sought to establish provocation merely on a foundation of motive. Provocation in this connection has a very precise meaning in law. The incidents upon which the contention of provocation is based must be contemporaneous with the killing, or, at any rate, closely related to the killing in point of time. A man cannot receive what he contends is provocation, go for a walk, think it over, deliberate upon killing the person whom he thinks has provoked him, find a deadly weapon, carry it to the scene and use it with fatal results hours after the start of the incident giving rise to the resentment, and then say: " There is evidence that I was provoked within the meaning of that word in law ". There may be evidence of provocation if there is evidence of assault

and battery of a serious nature and then a sudden killing, if there is a fight, if there is unlawful imprisonment, or if a husband observes an act of adultery on the part of his wife. There may be other circumstances which may provide evidence of provocation within the meaning of the law, but such things as those that I have mentioned indicate the general nature of the evidence to be looked for.

Further, the law provides that the test to be applied is not the effect upon the person charged with the killing, but the effect of the alleged provocation, whatever it is, upon a reasonable man. Again, regard must be had to the time that there was for cooling after the provocation. Further, the mode of resentment must bear some relation to the alleged provocation. A Bren gun which fires bullets in quick succession is one thing, but a woman showing preference for a particular lover is another. It is for the Judge to say whether there is any evidence upon which it would be reasonable for a jury to bring in a verdict of manslaughter. If there is no such evidence, he must withdraw the issue from the jury. A jury cannot return a verdict of manslaughter except upon evidence. If there is no evidence and a Judge leaves the issue of manslaughter to a jury, then there is a real danger that a jury may, for reasons of sympathy with the accused person or disapproval of the conduct of the deceased person, adopt a soft option available and evade their duty, which is to return a true verdict according to the evidence, by returning a lesser verdict which there is not a shadow of evidence to support. There was here no evidence upon which the jury could reasonably have brought in a verdict of manslaughter; on the contrary, the evidence was all the other way. Assuming that the treatment of the appellant by the deceased woman was provocation, which it was not, there was on the part of the appellant time for cooling. For the killing there was deliberation and there was preparation. He had said that he would do it; he got ready to do it; he did it. In the opinion of this Court, the learned

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Judge was right in saying at the close of the evidence what he did say and in indicating that he would direct the jury in the way in which he did.

The result, therefore, is that this appeal must be dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CHARLES AND MR. JUSTICE HALLETT.

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Evidence—Corroboration—Sexual Offence—Child—No Corroboration in Fact Present—Proper Warning by Judge—Conviction Quashed on Ground Verdict Unreasonable—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 4 (1).

Conviction of carnal knowledge and indecent assault quashed on the ground that the verdict was unreasonable in a case where there was no corroboration but the jury had been properly warned by the Judge of the danger of convicting without corroboration.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on July 7, 1943, of carnal knowledge of Minnie Crossman, a girl aged fourteen, and of indecently assaulting Doris Whitbread, a girl aged thirteen, and was sentenced by the Commissioner to two years' imprisonment.

Doris Whitbread, who was *virgo intacta*, gave evidence that she met the appellant in July, 1942. According to her story, she took some wood for sale to his place of business, and he told her to bring some more on the following day. When she went there on the next day, he told her to be quiet because of the people upstairs, gave her tea and indecently assaulted her. He then took her to his bedroom and tried to

get her on the bed, but when she called out he let her go, giving her 5s. for the wood and 2s. for herself.

She went again to the premises on the following day, when he again indecently assaulted her and asked her if she knew another girl, to which she replied that she knew Minnie Crossman. The next day she took Minnie Crossman with her, and appellant indecently assaulted Minnie Crossman and gave both girls money. They went together several times, and Doris Whitbread saw him committing a variety of indecent acts with Minnie Crossman. Minnie Crossman gave evidence that she and Doris Whitbread together visited the appellant on several occasions and that the appellant committed various indecent acts, in which she said that Doris Whitbread took part, though Doris Whitbread denied this. She said that on one occasion Doris's younger sister Gladys was there and saw what happened, and that the last time that the appellant had connection with her was on May 15, 1943. The appellant was acquitted on a count relating to that occasion and on a count charging him with carnal knowledge of Doris Whitbread. Minnie Crossman admitted in cross-examination that she had had connection with three boys on several occasions before she met the appellant, and a medical witness stated that it was obvious that she had had sexual intercourse on many occasions and presented the appearance of a married woman. The appellant gave evidence that the whole story told by the girls was a pack of lies, the only truth being that on the occasion when Doris Whitbread had delivered wood she had had a cup of tea in the appellant's room, but that that had been given to the girl by his landlady.

The Commissioner warned the jury of the desirability of looking for corroboration of the girls' evidence. He told them that the girls could not corroborate one another and that this must be regarded as a case in which there was no corroboration. He told them that it was open to them to convict without corroboration, but it would be dangerous to do it.

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The jury were absent for over three hours before arriving at their verdict.

W. G. Fordham, for the appellant:

It is conceded that the Judge warned the jury that it was dangerous to convict on the uncorroborated evidence of the girls, and that they were in fact uncorroborated. [He referred to BASKERVILLE, 12 Cr. App. R. 81; [1916] 2 K. B. 658.] The appellant relies on section 4 (1) of the Criminal Appeal Act, 1907. Under that section this Court is specifically required to interfere if, in all the circumstances, the verdict appears unreasonable having regard to the evidence. An examination of the evidence against the appellant discloses material discrepancies in the case for the prosecution, which, coupled with the facts that the character of the girls was most unsatisfactory and that it was at any rate possible that they had been prompted by another man to bring these charges against the appellant, support the contention that the verdict was unreasonable. [He was stopped.]

Laurence Vine, for the Crown:

No complaint is made of the terms in which the Judge warned the jury of the danger of convicting without corroboration. The jury had the opportunity of seeing the witnesses, and were best qualified to form an opinion of the cogency of their evidence. Where everything has been done perfectly regularly in the Court of trial, this Court should be slow to override the verdict of the jury. Otherwise it would mean that a case of this kind should never be brought where the evidence of the principal witness is uncorroborated. [He referred to BASKERVILLE, *supra.*]

HALLETT, J.: On August 26, when the application for leave to appeal was before the Court consisting of Humphreys, Atkinson and Cassels, JJ., Cassels, J., in giving leave, said: "This Court thinks that this is a matter which requires further consideration, and very serious consideration". The matter

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has now received very serious consideration from the members of the present Court. We desire to make it plain that, in taking, as we propose to take, a very exceptional course, we do so because we regard this as a very exceptional case, and not because we regard ourselves as initiating or applying any fresh principle.

The well-known principle applicable to cases of this kind is as follows: On the one hand, it is of the utmost importance that little girls should be protected against conduct of the kind which is here alleged to have taken place; the conduct of the appellant, if the girls' story is to be believed, was indeed of the most filthy and revolting character. The story was correctly described, as we think, by the learned Commissioner as a horrible story. That is one side of the matter. On the other hand, as the learned Commissioner correctly pointed out, these are charges which it is easy for females to bring, and difficult for the man against whom they are brought to refute. Therefore, it has been long laid down, not as a rule of law but as a rule of practice, that it is unsafe for a jury to convict on the evidence of the girl without corroboration.

In the present case it has been agreed throughout that the evidence of the three little girls was wholly uncorroborated; I say " three little girls " because, in addition to the two girls against whom the offences were alleged to have been committed, there was a third little girl, Doris's sister, aged twelve, who also gave some evidence. It is also agreed, and it is only fair to the learned Commissioner that this should be stated in the plainest possible terms, that the learned Commissioner did give to the jury the proper warning in the proper way. He told them that it was the practice to warn juries that it was dangerous in the case of sexual offences, and more particularly in cases where the complainants were little girls, to convict on the evidence of the complainants alone. He stated that quite plainly, and we have no criticism to make of the way in which he stated it. But, none the less, having received that warning,

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the jury, after an absence of three hours, thought fit to convict upon the evidence of the girls alone.

The question now arises what this Court should do in a case of that kind. Ordinarily speaking, there can be no doubt that, where the jury have been given proper warning, and notwithstanding that warning have convicted, this Court will not interfere; but it is sometimes advisable to go back beyond the decided cases to the Act of Parliament which constitutes this Court, and which is, after all, the final authority upon the principle which should guide this Court.

By section 4 (1) of the Criminal Appeal Act, 1907, it is provided: "The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence". That is the direction to this Court in the statute by which it is constituted, that it shall allow the appeal if it thinks that the verdict of the jury should be set aside on either of those two grounds.

If further exposition of the principle be needed, it can be found in BASKERVILLE, 12 Cr. App. R. 81; [1916] 2 K. B. 658. That was a judgment of a Court consisting of the then Lord Chief Justice (Lord Reading), Scrutton, Avory, Rowlatt and Atkin, JJ. In that case the necessity for corroboration arose from the fact that the witnesses primarily relied upon by the Crown were accomplices, but, whatever be the ground upon which corroboration is required, we think that the principle is the same. In that case the Lord Chief Justice said as follows (12 Cr. App. R., at p. 88; [1916] 2 K. B., at p. 663): "If after the proper caution by the Judge the jury nevertheless convict the prisoner, this Court will not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated. It can but rarely happen that the jury would convict in such circumstances. In considering whether or not the conviction should stand, this Court will review all the facts of the case, and bear in mind that the jury

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had the opportunity of hearing and seeing the witnesses when giving their testimony. But this Court, in the exercise of its powers, will quash a conviction even when the Judge has given to the jury the warning or advice above mentioned if this Court, after considering all the circumstances of the case, thinks the verdict unreasonable, or that it cannot be supported having regard to the evidence ". Then the learned Lord Chief Justice cited the statutory provision which I read a few moments ago.

It is upon that principle that the Court proposes to act in the present case. The Court which heard the application for leave to appeal said that this matter required very careful consideration. Having given that consideration to this case, this Court does think that, notwithstanding that proper warning or advice given to the jury, the verdict of the jury on the exceptional circumstances of this case was unreasonable, and was a verdict which cannot be supported having regard to the evidence.

I do not think it necessary to analyse in detail the considerations with regard to the evidence which have led us to that conclusion. The little girls, unfortunately, were plainly little girls whose credibility required very great scrutiny. One of them was described by the doctor as presenting the appearance of a married woman, and for the reasons I have indicated generally, though not in detail, we think that this is a conviction which cannot be safely allowed to stand, and which accordingly should be quashed.

Conviction quashed.

Note to CHARLES REGINALD BROWNE (*ante*, p. 106).

NOTE TO CHARLES REGINALD BROWNE (*ante*, p. 106).

Outstanding Offences Taken into Consideration—Conviction Quashed on Appeal—Prisoner Indicted Subsequently for Outstanding Offences—Plea of Autrefois Convict and Autrefois Acquit.

At Bournemouth Quarter Sessions on October 4, 1943, the prisoner appeared to answer two charges of obtaining money by false pretences. On arraignment he entered a special plea in bar, alleging that he had been previously convicted and, alternatively, that he had been previously acquitted, of both charges laid in the indictment. The Clerk of the Peace having joined issue on behalf of the Crown, a jury was empanelled to try these issues.

The undisputed facts were as follows. The prisoner was convicted at Hampshire Quarter Sessions on April 19, 1943, of obtaining money by false pretences. After conviction he admitted seven other outstanding offences of a similar nature and asked the Court to take them into consideration in passing sentence. The Court did so and passed a sentence of twenty months' imprisonment. The prisoner appealed to the Court of Criminal Appeal against both conviction and sentence, and on May 31, 1943, the Court ordered that the conviction be quashed and a verdict of acquittal upon the indictment be entered (see *ante*, p. 106), and the prisoner was accordingly discharged. He was subsequently re-arrested and charged with two of the outstanding offences which had been taken into consideration at Hampshire Quarter Sessions on April 19, 1943. These two charges were the subject of the indictment at Bournemouth Quarter Sessions.

G. W. Willett, for the prisoner:

The prisoner ought not to be in peril twice for the same offence. (2 Hawk. c. 35.) He has either been previously convicted at Hampshire Quarter Sessions, or alternatively has been previously acquitted by reason of the order of the Court of Criminal Appeal quashing his conviction, of both these offences. [The Recorder stated that defending counsel should elect on which plea he intended to rely, but, on counsel for the Crown stating that he waived any technical objection, Mr. Willett was allowed to argue the case in the alternative.] It cannot be said that the part of the sentence served by the prisoner before his conviction was quashed related only to the offences on which he had been convicted by the jury. The prisoner was sentenced also in respect of the outstanding charges which he admitted. His admission in open Court that he had committed the offences charged in the outstanding charges was tantamount to a plea of guilty; alternatively, the outstanding charges,

Note to CHARLES REGINALD BROWNE (*ante*, p. 106).

once they had been admitted by the prisoner and had been taken into consideration by the Court in passing sentence, were recorded on the indictment, and therefore the order of the Court of Criminal Appeal directing a verdict of acquittal upon the indictment included an acquittal on the outstanding charges also. [He referred to GRANT (1936), 26 Cr. App. R. 8; LESTER (1938), 27 Cr. App. R. 8, and SHERIDAN, 26 Cr. App. R. 1; [1937] 1 K. B. 228.] In the event of the jury holding that the prisoner's special pleas in bar are bad, he cannot plead over: GODDARD (1703), 2 Ld. Raym. 920.

A. C. Munro Kerr, for the Crown:

The prisoner was convicted at Hampshire Quarter Sessions only on the charges which were before the jury. The outstanding charges were considered only when the question of sentence arose, and the prisoner has, therefore, never been put in peril on either of the charges in the present indictment. A mere admission by a prisoner, after conviction, of other offences and a request by him that the Court should take them into consideration in passing sentence does not constitute a conviction in respect of those other offences. The prisoner has, therefore, neither been previously convicted nor previously acquitted of the offences charged in the present indictment. The order of the Court of Criminal Appeal related only to the conviction by the jury and it is only that conviction which they had power to quash. The outstanding charges did not form part of the indictment before the Court of Criminal Appeal and the quashing of the conviction merely rendered the prisoner's request to have those offences taken into consideration inoperative. The conviction of the prisoner by the jury was a condition precedent to the taking into consideration of the outstanding offences and once that conviction was quashed, the whole basis of taking into consideration the outstanding charges was removed.

The prisoner gave evidence, and no evidence was offered on behalf of the Crown. The Recorder then summed-up and directed the jury that in his view there was no evidence which would entitle them to say either that the prisoner had been previously convicted or that he had been previously acquitted of either of the offences wherewith he was now charged, but left the issue to them.

The jury, after a short retirement, returned a verdict that the prisoner had been previously convicted of both the charges laid in the indictment, and the prisoner was discharged.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CHARLES AND MR. JUSTICE HALLETT.

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Murder—Evidence—Silence of Prisoner after Caution on Arrest—Adverse References in Summing-up—Conviction Quashed—Criminal Appeal Act, 1907 (*7 Edw. 7. c.* 23), *s.* 4.

The appellant, on being arrested on a charge of murder, was cautioned in the usual terms. He replied to a police officer: "I have nothing to say until I have seen someone, a solicitor." Before that he had said (after caution) to another police officer on being questioned on his movements at the material time: "Before I make a statement I should like to get advice." The Judge, in his summing-up, referred to the appellant's silence after caution on those two occasions in terms according to which (in the opinion of the Court of Criminal Appeal) it seemed that the jury were told that they might infer or find the appellant's guilt by considering the fact of his silence after caution.

Held, that that amounted to a misdirection, and the conviction must be quashed.

NAYLOR, 23 Cr. App. R. 177; [1933] 1 K. B. 685, followed.

Refusal to apply the proviso to section 4 of the Criminal Appeal Act, 1907.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on September 22, 1943, of murder and was sentenced by Singleton, J., to death.

On June 13 Mrs. Caroline Ellen Trayler, aged eighteen, who was employed as an usherette at a cinema in Folkestone, disappeared from her parents' house, where she was at the time living. Four days later her dead body was found in the passage of some unused premises, death being due to strangulation. The medical evidence suggested that she had been raped. She had been seen in the appellant's company on

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the night of June 13 by several persons. On June 29 the appellant was arrested on a charge of larceny. On June 30 the appellant was interviewed at Marylebone Police Station by Detective Inspector Smeed, of the Kent Constabulary, and questioned (after caution) with regard to his movements on June 13. He replied: "I was with the girl. I want to be fair to you and to myself, and before I make a statement I should like to get advice." The appellant was then arrested and taken to Folkestone, where he was charged with murder and cautioned by Detective Inspector Pierce, also of the Kent Constabulary, and said in reply: "Well, I have nothing to say until I have seen someone, a solicitor." At the trial the appellant gave evidence. He stated that he met Mrs. Trayler on the night of June 13 in a public-house called the Mechanics' Arms, Folkestone, that he spent some time with her there and left with her at 10 o'clock, after which he had sexual intercourse with her, to which, he said, she was an assenting party. He said that then he left her at her own wish, because she did not wish to be seen with him at that hour, and received from her directions how to get to the place to which he wished to go.

In his summing-up Singleton, J., on three occasions made adverse reference to the appellant's silence after caution. The passages are set out in the judgment.

J. D. Casswell, K.C. (*Harold Brown*, with him), for the appellant:

The Judge's comments in the summing-up on the fact that the appellant after caution by the police did not deny the charge were wrong. They were tantamount to saying that if a prisoner says that he intends to reserve his defence (as he is perfectly entitled to do) that may be relied on as evidence against him tending to show that he was guilty of the crime charged. Such comments were held to be wrong in WHITEHEAD (1928), 21 Cr. App. R. 23; CHARAVANMUTTU (1930), 22

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Cr. App. R. 1, and NAYLOR, 23 Cr. App. R. 177; [1933] 1 K. B. 685.

John Flowers, K.C. (*L. A. Byrne* and *Gerald Howard*, with him), for the Crown:

The Judge's comments on the appellant's silence after caution cannot be supported, but counsel on both sides reminded the jury that the fact that the appellant chose to keep silence when cautioned by the police could not be regarded as evidence against him. The case, however, was one where, quite apart from the Judge's comments, the evidence against the appellant was overwhelming, and the Court is asked to consider whether the proviso to section 4 of the Criminal Appeal Act, 1907, ought not to be applied in this case.

THE LORD CHIEF JUSTICE (after referring to the facts and stating that, in the opinion of the Court, there was nothing in other alleged grounds of misdirection): I come now to the last ground relied on by Mr. Casswell—namely, that the Judge on three occasions, in the course of his summing-up, made references to the silence of the appellant, which made his direction a misdirection. On two occasions police officers cautioned the appellant. Detective Inspector Pierce, of the Kent Constabulary, took the appellant to Folkestone after his arrest. In answer to a question at the trial Detective Inspector Pierce said: "I cautioned him. I asked him if that was the uniform he was wearing," and so on. The witness then said that the appellant was again cautioned after the charge, and, after some hesitation, replied: "Well, I have nothing to say until I have seen someone, a solicitor."

The earlier occasion on which the appellant was cautioned was when Detective Superintendent Smeed, also of the Kent County Constabulary, together with another police officer, saw him on June 30 at Marylebone Police Station. Smeed, in evidence, said that he told the appellant who they were, and that they were making inquiries about

the death of a young woman named Mrs. Trayler. In answer to the question whether the appellant said anything in reply to that, Smeed said that the appellant replied: "I know about it". Smeed then stated that he said to the appellant: "She was last seen in company with a soldier, and inquiries show that she was murdered on Whit Sunday night, June 13"; that he cautioned him and said: "Do you care to give me an account of your movements late that day?"; and that the appellant replied: "I was with the girl. I want to be fair to you and to myself, and before I make a statement I should like to get advice." The references to the caution are, of course, the well-known formula which is used when police officers caution a person charged.

When the Judge came to sum up, he dealt with this matter three times. He said, "On June 30 Detective Inspector Pierce, of the Kent County Constabulary, saw the accused, and he said he found upon him a large number of things. He said on that evening he charged him with this offence, and cautioned the accused, and the accused said, 'Well, I've nothing to say until I've seen someone, a solicitor'. Again, members of the jury, I draw your attention to the fact, as was emphasised by the defence, that this man was apparently always cool and collected. If a man is charged with murder, and is not responsible, if he had not committed murder or anything like murder, what do you expect him to say? Would you expect him to deny it? According to the inspector, what the accused said was: 'Well, I've nothing to say until I've seen somebody, a solicitor.' Of course, members of the jury, he is not bound to say anything, but what would you expect?"

A little later on the Judge said, repeating the evidence of Smeed, which I have read: "Again, as I said before, it is not necessary for a man to say anything on such an occasion, but is it not a little difficult to see why, if a man is asked to account for his movements and told what the inquiries were being made for, he should not say, 'I did not murder the girl; when I left her she was all right', if that be the fact?"

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Lastly, the Judge said almost at the end of his summing-up: "It may well be that the coolest and most calculating man ordinarily would get into a panic if he thought he might be charged with murder or thought he might be asked questions, but can you understand how it comes about, if he be innocent of the charge made against him, that he never said 'I did not murder the girl. When I left her she was perfectly all right'?"

It is submitted on behalf of the appellant that those statements by the Judge amounted to such misdirection as should lead this Court to quash the conviction. This subject has been dealt with more than once by this Court. In WHITEHEAD (21 Cr. App. R. 23; [1929] 1 K. B. 99), the Lord Chief Justice (Lord Hewart), in dealing with a case of conviction for unlawful carnal knowledge of a girl under the age of sixteen, said (21 Cr. App. R., at p. 24; [1929] 1 K. B., at p. 102): "When the police officer served the summons, he cautioned the appellant in the usual way, and the appellant said: 'I do not want to say anything about it now', and the jury were directed that it was for them to decide whether there was corroboration or not according as they thought whether a respectable man would or would not deny such a charge; if they thought the failure on appellant's part to make a denial when the charge was sprung upon him by the police officer corroborated the girl's evidence then they would probably accept more readily that evidence as being corroborated to that extent. This is a misdirection", and he went on to say the conviction must be quashed.

CHARAVANMUTTU ((1930), 22 Cr. App. R. 1) was a case of a charge of indecent conduct towards two boys, and the Lord Chief Justice (Lord Hewart), in dealing with what had been treated at the trial as evidence of corroboration, said (at p. 4): "It is quite clear that three matters were treated, if not, indeed, as being evidence of corroboration, as being matters which tended to support the evidence of the boys. One was the silence of the accused at the time when the charge was

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made—silence amounting to this, at any rate, that at the stage then reached he said that he reserved what he had to say. It is true that this remark was not treated as corroboration under the name of corroboration, but at the close of the summing-up the incident was brought prominently to the attention of the jury as something which might help them on the main question. It would be unfortunate if the jury thought that mere silence of the accused might amount to corroboration, for it is well settled since the decision in WHITEHEAD (*supra*) that it could not be." Those two cases, I observe, were dealing with the question of corroboration, corroboration being needed, or at any rate desirable, in cases of that kind.

In NAYLOR (23 Cr. App. R. 177; [1933] 1 K. B. 685) the appellant had been cautioned in these words: " 'Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing and may be given in evidence upon your trial.' In reply to that caution the appellant said: 'I do not wish to say anything, except that I am innocent'." The Recorder in his summing-up said: " Imagine a purely innocent man accused of housebreaking and having these words put to him—'Do you wish to say anything in answer to the charge?' Surely, if he is innocent, one would think he would give some explanation of where he was and what he was doing at the particular time, and would make his defence then and there. . . . Of course, what lurks in the background of this sort of hanging back and not disclosing his defence is that he gives the prosecution and the police no time to inquire into any statement he may make, so that it might be possible to show that these statements are not true." The Lord Chief Justice (Lord Hewart) said (23 Cr. App. R., at p. 180; [1933] 1 K. B., at p. 687): " When one looks at the words of the caution in section 12 (2) of the Criminal Justice Act, 1925, which must be taken to have been framed deliberately, it is obvious that they were intended to convey

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to the prisoner the information that he is not obliged to say anything unless he desires to do so. We do not think that the words of the caution can properly be construed in the sense that the prisoner remains silent after being cautioned at his peril and may find his silence made a strong point against him at his trial. In our view, the words mean what they say, and a prisoner is entitled to reply to the caution that he does not wish to say anything."

Lastly, in LITTLEBOY (24 Cr. App. R. 192, at p. 196; [1934] 2 K. B. 408, at p. 412), the Lord Chief Justice (Lord Hewart) made these observations: "The real point urged on behalf of the appellant is that the Judge was wrong in making observations upon the fact that the defence of alibi had not been disclosed before the magistrates, and our attention has been directed to NAYLOR (*supra*). It is important to observe that in that case the fact that the appellant had not disclosed his defence at an earlier date was employed as being evidence against him in corroboration of an alleged accomplice, who had given evidence for the prosecution. It is important to remember that the judgment in that case was given with reference to those facts. It is quite true that there are sentences to be found in the report of that judgment which appear to be of universal application. We do not think, however, that it was ever intended to lay down the proposition that a Judge may not in a proper case comment on the fact that the defence has not been disclosed on an earlier occasion. It is one thing to make an observation with regard to the force of an alibi, and to say that it is unfortunate that the defence was not set up at an earlier date so as to afford the opportunity of its being tested; it is another thing to employ that non-disclosure as evidence against an accused person and as corroborating the evidence of an accomplice."

Having considered those cases, and in particular the clear and emphatic language used in NAYLOR (*supra*), the question is whether or not the passages which I have read from the summing-up in the present case amount to a misdirection

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justifying the quashing of the verdict, subject to one other point, which I will mention. I observe, as has been noticed in the course of the argument, that what the Judge said in the third of the three passages which I read was: "It may well be that the coolest and most calculating man ordinarily would get into a panic if he thought he might be charged with murder or thought he might be asked questions, but can you understand how it comes about, if he be innocent of the charge made against him?", and that these are almost identical words to those used in NAYLOR (*supra*), and wrongly used. Similarly, in one of the other passages, the Judge said: "but is it not a little difficult to see why, if a man is asked to account for his movements and told what the inquiries were being made for, he should not say, 'I did not murder the girl; when I left her she was all right', if that be the fact?"

Therefore, three times over, once at the beginning, once a little later on, and a third time just before the end of his summing-up, the Judge seems to put to the jury the consideration that they might infer or find the appellant's guilt by considering the fact of his silence after caution. We think that that amounted to a misdirection, and it is proper ground on which this verdict, subject to one other question, should be quashed. If it were not so, it must be obvious that a caution may be indeed a trap instead of being a means for finding out the truth in the interests as much of innocent persons, as it is in the interests of justice against guilty persons. An innocent person might well, either from excessive caution or for some other reason, decline to say anything when charged and cautioned, and if it were possible to hold that out to a jury as ground on which they might find a man guilty, it is obvious that innocent persons might be in great peril. However that may be, the law seems to us clear, and to have been clearly laid down by this Court on more than one occasion, particularly in NAYLOR (*supra*).

The only question which remains is one which has been raised by Mr. Flowers, who was not really in a position to

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dispute the conclusion which we perhaps indicated we were prepared to reach—namely, that the Judge did misdirect the jury in the passages to which I have referred. Mr. Flowers, with great propriety, did not think it proper to contest that question, but asked this Court to exercise the powers given to it by the proviso to section 4 of the Criminal Appeal Act, 1907: "Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

That passage has been commented on in clear, though brief, terms in WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 25 Cr. App. R. 72; [1935] A. C. 462, where Lord Sankey, L.C., made these observations (at pp. 96 and 482 of the respective reports): "We were then asked to apply the proviso of section 4 of the Criminal Appeal Act, 1907 . . . There is no doubt that there is ample jurisdiction to apply that proviso in a case of murder. The Act makes no distinction between a capital case and any other case, but we think it impossible to apply it in the present case. We cannot say that if the jury had been properly directed they would inevitably have come to the same conclusion." That passage finally disposes of any doubt, if there were any doubt, whether the powers of the Court as set out in the proviso apply to cases of murder just as much as to any other criminal charge. What the Lord Chancellor, giving the opinions of himself and other noble Lords, said was that they could not say that if the jury had been properly directed they would inevitably have come to the same conclusion.

In this case, although evidence which would have justified a verdict of guilty on a proper direction is to be found in plenty, we feel unable to say that a jury would inevitably have come to the conclusion of guilty. It is the opinion of the jury, and not ours or that of anybody else, which is to be

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invoked. Before this Court can exercise the powers given to it in the proviso, it must be satisfied that the jury would have inevitably come to the same conclusion. Having regard to the importance which the passages referred to must have had in the scheme of the summing-up, and in view of the effect which they seem to us very likely to have had on the minds of the jury when they were considering their verdict, we are not able to say that the jury would inevitably have found a verdict of guilty. The conclusion, therefore, is that we must quash this conviction.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE MACNAGHTEN AND MR. JUSTICE HALLETT.

FRANK EPHRAIM OLIVER.

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Burden of Proof—Negative Averment—Excepted Class—Prosecution Not Required to Prove Negative—Emergency Legislation—Offence—Penalties Increased by Later Order in Council—Applicability of Increased Penalty to Offence Already Complete—Defence (General) Regulations, 1939 (*S. R. & O.*, 1939, *No.* 927), *reg.* 55 (1D)—*Sugar (Control) Order*, 1940 (*S. R. & O.*, 1940, *No.* 1068), *art.* 2.

By the Sugar (Control) Order, 1940, art. 2 : " Subject to any directions given or except under and in accordance with the terms of a licence, permit or other authority granted by or on behalf of the Minister [of Food], no . . . wholesaler shall by way of trade . . . supply . . . any sugar."

The onus of proving that the defendant has a licence, etc., under the above order is on the defendant, and the prosecution are under no obligation to give evidence to prove a *prima facie* case on this matter.

SCOTT (1921), 86 J. P. 69, applied.

TURNER (1816), 5 M. & S. 206, approved.

By regulation 55 (1D) of the Defence (General) Regulations, 1939 : " Any person guilty of an offence against this regulation,

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being a breach of the control or an offence referred to in paragraph (1B) or (1C) of this regulation, shall be liable . . . (b) on conviction on indictment, to a fine not exceeding the maximum amount [provided in paragraph (1E)], or to penal servitude for a term not exceeding fourteen years or to both such fine and such penal servitude; and shall in every case be ordered to pay such a fine as aforesaid, of an amount not less than the minimum amount provided in paragraph (1E) of this regulation, unless, having regard to any special circumstances, the Court think there is good reason for not imposing a fine or for imposing a fine of less amount." This provision, inserted in regulation 55 for the first time by S. R. & O., 1942, No. 501, on March 23, 1942, increased the penalties for a contravention of the regulation or an order made under it above those prescribed by regulation 92 of the Regulations, and later by S. R. & O., 1941, No. 981.

In view of the clear and unambiguous language of the above paragraph, it must be interpreted as having a retroactive effect.

A Court has, therefore, to consider what are its powers with regard to penalties only at the time when the indictment comes before it, and may impose the increased penalties for offences notwithstanding that they were already completed at the time when the paragraph permitting the increased penalties was added to the regulation.

DIRECTOR OF PUBLIC PROSECUTIONS *v.* LAMB, [1941] 2 K. B. 89, and BUCKMAN *v.* BUTTON, [1943] 1 K. B. 405, applied.

Appeal against conviction and sentence.

The appellant was convicted at Middlesex Sessions on July 9, 1943, on twelve counts of an indictment containing eighteen counts charging offences in connection with articles of food controlled under regulation 55 of the Defence (General) Regulations, 1939, and orders fixing maximum prices.

Counts 1—6 charged him under the present paragraph 1B of the Regulation with stealing controlled articles and receiving controlled articles knowing them to have been stolen, but as that paragraph was first introduced by Statutory Rule and Order, 1942, No. 501, which came into effect on March 23, 1942, whereas the offences were alleged

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to have been committed before that date, these counts were accordingly quashed. Counts 7—10 charged the appellant with supplying controlled goods, namely, sugar, otherwise than under and in accordance with the terms of a licence, permit or other authority granted by or on behalf of the Minister of Food, contrary to article 2 of the Sugar (Control) Order, 1940, made in pursuance of powers conferred by regulation 55. Counts 11—15 charged the appellant with selling controlled food at a price exceeding the appropriate price contrary to Defence (General) Regulation 55 and certain Orders fixing maximum prices. Counts 16—18 charged the appellant with selling a specified article at a price exceeding the maximum price prescribed under certain Orders.

The appellant was convicted on all counts 7—18 and was sentenced to three years' penal servitude on each count, to run concurrently. He was also fined £5,000 on count 17 and £500 on each of the other counts on which he was convicted. He was further ordered to pay £150 towards the costs of the prosecution.

The appellant was a director of Great West Bakeries, Ltd. A witness named Doctor, trading as Doctor's Products, manufactured coffee essence for which he needed burnt sugar. He received an allocation of sugar for this purpose from the Ministry of Food and obtained his supplies from Tate & Lyle, the well-known sugar refiners. In April, 1941, Doctor, who had found it difficult to get his sugar burnt for him, arranged with the appellant for some sugar to be delivered direct to the Great West Bakeries, and he paid the appellant for burning the sugar. After a time he found or suspected that he was not receiving enough burnt sugar to account for all the sugar which he had had delivered to the Great West Bakeries for burning. Evidence was given by other witnesses that the appellant sold and delivered sugar to a number of other persons and received payments for the quantities so delivered. There was further evidence that the appellant was paid more than the maximum price for the sugar which he so supplied, and that

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in the case of other articles, cocoa, butter and certain egg products, which he sold, he charged and was paid a price exceeding the maximum price. The appellant himself did not give evidence at the trial.

G. O. Slade, K.C., and *E. M. Hoy*, for the appellant: The prosecution did not with regard to counts 7—10 discharge the onus of proof which rested on them to show that the appellant had not a licence. They were bound to give at least sufficient evidence to prove a *prima facie* case on the absence of any licence on the part of the appellant to supply sugar. There is a series of decisions in civil cases supporting this contention: WILLIAMS *v.* EAST INDIA CO. (1802), 3 East 192; ELKIN *v.* JANSON (1845), 3 M. & W. 655; ABRATH *v.* NORTH EASTERN RY. (1883), 11 Q. B. D. 440, affirmed in H. L. (1886), 11 A. C. 247; HIRE PURCHASE FURNISHING CO. *v.* RICHENS (1888), 20 Q. B. D. 389, and the criminal case of JAMES, [1902] 1 K. B. 540. Further, the appellant was not a wholesaler within the meaning of article 1 of the Sugar (Control) Order, 1940. The test of whether a person is a wholesaler is whether he sells to someone something which the purchaser intends to re-sell by way of trade. Further, on the evidence the appellant was not himself the seller of controlled food at all, but merely an agent employed on a commission basis. On the question of the sentence, the Deputy Chairman should not have imposed the increased penalties allowed under S. R. & O., 1942, No. 501, which came into force on March 23, 1942, after the offences had been committed. The order should not be treated as having a retroactive effect in the matter of penalties. Where any enactment alters the rights of persons and creates fresh liabilities, the enactment ought not to be held to be retroactive unless its language is unambiguous and clear. [He referred to *Maxwell's Interpretation of Statutes*, 8th ed., p. 190.] The argument now advanced on this matter is contrary to decisions of the Divisional Court in DIRECTOR OF

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PUBLIC PROSECUTIONS *v.* LAMB, [1941] 2 K. B. 89, and BUCKMAN *v.* BUTTON, [1943] 1 K. B. 405, but this Court is asked to overrule those decisions.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), and *Frederick D. Levy*, for the Crown:

The Deputy Chairman was right in directing the jury that the onus of proving that he was within the excepted class lay on the defendant. There is no difference in principle between the decision in TURNER (1816), 5 M. & S. 206, where the general rule was laid down by Lord Ellenborough and Bayley, J., that if a negative averment was made by one party, which was peculiarly within the knowledge of the other party, it rested on the party within whose knowledge it lay to prove the affirmative, and the language of Lord Alverstone, C.J., in JAMES (*supra*). The decision in TURNER (*supra*) is supported by PAGE, [1906] 1 K. B. 87, and the judgment of Talbot, J., in WILLIAMS *v.* RUSSELL (1933), 147 L. T. 190. The civil cases cited on behalf of the appellant are in accord with the above principle, and the same principle has applied throughout to negative obligations, though obligations which were in fact negative were sometimes put in neutral words. On the question of the applicability of the increased penalties, the language of the new paragraph introduced into regulation 55 by S. R. & O., 1942, No. 501, is quite clear and free from ambiguity. The words of the paragraph deliberately and consciously relate to the time of conviction and not the time of the commission of the offence. If there were any ambiguity, the Court would have to regard the fact that the regulation was made to safeguard the public interest and weigh that factor against the general canons of construction. The decisions of the Divisional Court in DIRECTOR OF PUBLIC PROSECUTIONS *v.* LAMB (*supra*) and BUCKMAN *v.* BUTTON (*supra*) should be followed.

G. O. Slade, K.C., replied.

Cur. adv. vult.

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November 22.—The judgment of the Court was read by:

THE LORD CHIEF JUSTICE (after stating the charges and the facts, as set out above): The first point taken by counsel for the appellant before us was in relation to counts 7—10 and was that the prosecution had not discharged the onus of proof, which rested on the prosecution, to show that the appellant had no licence to supply sugar. The material provisions are contained in the Sugar (Control) Order, 1940, article 2 of which is as follows: "Subject to any directions given or except under and in accordance with the terms of a licence, permit or other authority granted by or on behalf of the Minister no . . . wholesaler shall by way of trade . . . supply . . . any sugar." The point is wholly without merit, inasmuch as no one knew better than the appellant whether he had a licence or not, but none the less the point requires consideration, particularly in view of certain decisions to which our attention was called. The appellant did not give evidence, and indeed we were told by Mr. Slade that the appellant was not called by him because of this very point of the licence. If the appellant was in a position to say that he had a licence, he had a complete answer to the charges made against him under counts 7—10. The learned Deputy Chairman of the Middlesex Sessions in summing up told the jury that the onus of proving that the appellant had a licence was on the appellant and that they must accept his direction that the appellant had no licence in view of the appellant's silence. There is direct authority on this point. In SCOTT (1921), 86 J. P. 69) a similar question arose upon an Order made under the Dangerous Drugs Act, 1920, which provided that no person should supply any of the specified drugs unless he was licensed by the Secretary of State to supply the drug. The point was taken at the close of the case for the prosecution that there was no evidence that the defendant was an unauthorised person. Swift, J., held that if the defendant were licensed it was a fact which was peculiarly

within his own knowledge and there was no hardship on him in being put to the proof. He said (at p. 70): "It might be very difficult or impossible for the prosecution satisfactorily to prove that he did not possess any one or other of the qualifications which might entitle him to deal with the drug. But the defendant could prove without the least difficulty that he had authority to do it." Unless we are satisfied that this decision is clearly wrong, we should think it our duty to follow the decision of Swift, J.

Mr. Slade's contention that the prosecution must at least give enough evidence to prove a *prima facie* case was said by him to be supported by the decisions in a number of cases, the first of which was WILLIAMS *v.* EAST INDIA COMPANY (1802), 3 East 192. In that case the plaintiff by his declaration said that the defendants, who had chartered his ship, put on board a dangerous commodity without due notice to the captain, and it was held that it lay upon the plaintiff to prove the negative averment. The Chief Justice (Lord Ellenborough) said, at p. 199, the "rule of law is, that where any act is required to be done on the one part, so that the party neglecting it would be guilty of a criminal neglect of duty in not having done it, the law presumes the affirmative, and throws the burden of proving the contrary, that is, in such case of proving a negative, on the other side". The Court of King's Bench held that the plaintiff had not given sufficient *prima facie* evidence of the want of a notice to have gone to a jury. They held that the best evidence should have been given of which the nature of the thing was capable, and that the best evidence was that which the persons immediately and officially employed in the delivery and the receiving of the goods on board could have given. ELKIN *v.* JANSON (1845), 13 M. & W. 655, was an action on a marine policy of insurance in which the defendant pleaded that the plaintiff wrongfully concealed certain facts material to the risk. Baron Parke said that, although the allegation of the defendant was negative in its terms, still, as it was the duty of the assured

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to make that communication, some evidence ought to have been given by the defendant to show that the material communication was not made to him. In ABRATH *v.* NORTH EASTERN RY. (1883), 11 Q. B. D. 440, Bowen, L.J., dealing with an action for malicious prosecution, said, at p. 457, that in an action for malicious prosecution the plaintiff has the burden throughout of establishing the want of reasonable or probable cause for instituting the prosecution, and continued: "In one sense that is the assertion of a negative, and we have been pressed with the proposition that when a negative is to be made out the onus of proof shifts. That is not so. If the assertion of a negative is an essential part of the plaintiff's case, the proof of the assertion still rests upon the plaintiff". Another citation was made from a judgment of Bowen, L.J., in the case of HIRE PURCHASE FURNISHING CO. *v.* RICHENS (1888), 20 Q. B. D. 387, at p. 389: "There is a broad principle that where a defendant is attempting to set aside a transaction for illegality, and the facts connected with it are equally consistent with the transaction being legal or illegal, it lies on the defendant to prove the illegality." Lastly, in JAMES, [1902] 1 K. B. 540, the Lord Chief Justice (Lord Alverstone) stated (at p. 545) "the substance of the authorities" as follows: "It is not necessary for the prosecution to negative a proviso, even though the proviso be contained in the same section of the Act of Parliament creating the offence, unless the proviso is in the nature of an exception which is incorporated directly or by reference with the enacting clause, so that the enacting clause cannot be read without the qualification introduced by the exception."

We are far from satisfied that these various passages are authorities for Mr. Slade's contention in the circumstances of the present case. There seems to us indeed no reason why an indictment should not have been framed without the averment that the supply was otherwise than under and in accordance with the terms of a licence granted by the Ministry of Food. It would have been sufficient, in our judgment,

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merely to charge the appellant with having supplied controlled goods contrary to the provisions of the Order. The appellant's answer would then be in the nature of a confession and avoidance assuming the fact to be that he had a licence to supply. We are not impressed with the argument based upon the form of the Order. With the greatest respect for the judgment of Lord Alverstone, C.J., in JAMES (*supra*), it seems to us to be very difficult to make the result depend on the question whether the negative is of a proviso or of an exception. We think it makes no difference at all that the Order was drafted as it now appears instead of being in a form which absolutely prohibits the supply of sugar except as thereinafter provided, with a later clause providing that if a person is supplied under a licence he should be excused. In WILLIAMS *v.* THE EAST INDIA CO. (*supra*), the offence was putting on board a dangerous commodity without due notice. Although in form the words "without due notice" import a negative, the plaintiff's allegation was positive, namely, that the articles were put on board without due notice and the plaintiff was under the necessity of proving his case. In ELKIN *v.* JANSON (*supra*), the action on the policy was bound to succeed if it had not been for the assertion by the defendant of non-disclosure, upon proof of which he would be entitled to succeed. There the case made by the defendant was that there was no disclosure of material facts. What he asserted he must prove and if he gave no evidence his case failed. As to the test suggested by Bowen, L.J., namely, that when the assertion of a negative is an essential part of the plaintiff's case, the proof of the assertion still rests upon the plaintiff, it seems to us in this case that it was not a necessary part of the case for the prosecution to assert or prove a negative. The prosecution had a complete case when proof had been given that there had been a supply by the appellant unless and until the appellant could escape the prohibition contained in the Order by proving the facts which were necessary to his

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case. Support for this proposition is to be found in the judgment of the Court of King's Bench in TURNER (1816), 5 M. & S. 206. Bayley, J., said (at p. 211): "I have always understood it to be a general rule, that if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies and who asserts the affirmative is to prove it, and not he who avers the negative." In *Hawkins' Pleas of the Crown* (Vol. 2, p. 460, Chapter 89, section 17), the following passage under the heading "on embezzling naval stores" occurs: "It seems also agreed, that although the indictment state that the prisoner 'then or at any time before, not being a contractor with or authorised by the principal officers or commissioners of our said Lord the King, of the navy, ordnance or victuallers or victualling office, for the use of our said Lord the King, to make any stores of war, etc.', yet that it is not incumbent on the prosecutors to prove this negative averment, but that it is incumbent on the defendant to show, if the truth be so, that he is within the exception in the statute".

The latest case to which our attention was called in this connection was WILLIAMS *v.* RUSSELL (1933), 149 L. T. 190, at p. 191, where Talbot, J., said: "On the principle laid down in TURNER (*supra*) and numerous other cases, where it is an offence to do an act without lawful authority, the person who sets up lawful authority must prove it, and the prosecution need not prove the absence of lawful authority. I think the onus of the negative averment in this case was on the accused to prove the possession of the policy required by the statute." In BUCKMAN *v.* BUTTON, [1943] 1 K. B. 405, the Court did not have to consider what would have been the position as regards onus apart from the provisions of the Summary Jurisdiction Acts, 1848 and 1879.

In the circumstances of the present case we are of opinion that the prosecution was under no necessity of giving *prima facie* evidence of the non-existence of a licence.

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A second submission was then made by Mr. Slade to the effect that the appellant was not a wholesaler within the meaning of article 1 of the Sugar (Control) Order. We think that the definition of " wholesaler " is clear. It provides in effect that a person who sells sugar by wholesale is a " wholesaler ", but not if he be a retailer or manufacturer who sells sugar also on some occasions by wholesale. The appellant clearly was one who sold sugar by wholesale having regard to the large quantities which he supplied, running up to 4 tons at a time, and it was not suggested to us that he was either a retailer or a manufacturer. It was somewhat strenuously argued that the proper test of a " wholesaler " is whether he sells to someone something which the buyer is going to sell again. No doubt purchasers from the wholesaler are often, and indeed generally, persons who intend to sell again by way of trade the goods purchased, but it is not difficult to imagine many cases in which a wholesaler enters into transactions with persons who have no intention of selling the articles thus purchased. We think, therefore, these contentions fail. Mr. Slade conceded that the supplying, if any, was " by way of trade ".

We do not think it necessary to deal at length with some other contentions raised but not very much pressed on behalf of the appellant. One such point taken by Mr. Slade in relation to counts charging the appellant with selling controlled food at more than the maximum prices was that the appellant did not sell the goods, but merely played the part of an agent and worked for a commission. Another contention was that, as it was part of the case for the prosecution that the sugar was stolen by the appellant, he could not pass the property in the sugar and so could not sell it. It was admitted before us that the appellant paid for the goods in question and received them and in his turn took payment for the goods. On these facts we think that both these points fail.

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A further contention on behalf of the appellant was that the learned Deputy Chairman had misdirected the jury by telling them that, even if they considered the appellant to have been an agent, they could convict him under section 8 of the Accessories and Abettors Act, 1861. It was formerly the law that in cases of felony nobody could be convicted as an accessory unless the principal felon had been convicted, and this explains the provision to the contrary effect in sections 2 and 3 of the Accessories and Abettors Act, 1861. No similar provision occurs, or was needed, in section 8 for the simple reason that no similar principle ever applied in cases of misdemeanour. Accordingly, Mr. Slade did not rely upon the point that the principals of the appellant, if any, had not been convicted, but he fell back upon the contention that their guilt had not been established, and relied very strongly upon Doctor's evidence that he had never authorised the appellant to supply the sugar to the London Yeast Co., Ltd. In other words, for the purpose of negativing the guilt of Doctor as a principal, he invited the Court to accept Doctor's evidence, although for the purpose of establishing that the appellant in those, as in other transactions, was merely an agent, he invited the Court to reject Doctor's evidence. The appellant cannot have it both ways. If the appellant was a principal, the prosecution did not have to rely on section 8 of the Act of 1861, whereas if he was an agent, there was adequate evidence on each count to prove the commission of the principal offence. We think that there is no sound foundation for this ground of appeal.

For all these reasons we think that the appeal against conviction must be dismissed.

The appellant also appeals against his sentence. The Deputy Chairman in passing sentence availed himself of the provisions of paragraph 1D of regulation 55 of the Defence (General) Regulations, 1939, which prescribe penalties far exceeding those originally prescribed by regulation 92 and later

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by Statutory Rule and Order, 1941, No. 1981. That paragraph was first inserted in the regulation by Statutory Rule and Order, 1942, No. 501, which came into operation on March 23, 1942, that is to say after the offences in question in this case had been committed, but before the appellant's guilt of them had been established. The contention on behalf of the appellant was the same as that advanced by Mr. Slade on behalf of the appellant in BUCKMAN *v.* BUTTON, [1943] 1 K. B. 405, where the same paragraph 1D was under consideration. It was there, as here, contended that, the offence having been committed before the date of the coming into operation of the Order, the increased penalties could not be imposed. We do not doubt in any way the correctness of Mr. Slade's argument that, where an enactment alters the rights of persons or creates fresh liabilities, the enactment ought not to be held to be retroactive unless the language is quite unambiguous and clear. We therefore look at the relevant terms of the paragraph which has been inserted by the Order in the Regulation. It provides as follows: "Any person guilty of an offence against this Regulation being a breach of the control or an offence referred to in paragraph (1B) or (1C) of this Regulation, shall be liable . . . (b) on conviction on indictment to" certain penalties. The contention on behalf of the appellant was that, although the words "any person guilty of an offence" are capable of including a person who has committed an offence before the making of the Order, yet the words are not so clear as to require this construction necessarily to be placed upon them and that therefore they ought not to be held to operate retroactively. The judgments of the Divisional Court in BUCKMAN *v.* BUTTON (*supra*) deal with precisely this same point, but we were invited by Mr. Slade to say that those judgments were wrong. It was there held that the paragraph was clear and unambiguous and that the justices in that case acted correctly in imposing penalties consistent with it notwithstanding the fact that this gave the paragraph a retroactive effect. Charles, J., referred to the decision of the

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Divisional Court in DIRECTOR OF PUBLIC PROSECUTIONS *v.* LAMB, [1941] 2 K. B. 89. In that case also the law as to the penalties in the circumstances of the case had been altered after the commission of the offence but at a date considerably before the laying of the informations and to a greater extent before the hearing of them. Humphreys, J., thought that the language of the Order in Council in question in that case was "perfectly plain". The words of the Order were as follows: "Where any person is convicted of an offence against these Regulations". Similarly we think that the words of the paragraph which we have to construe satisfy the rule of construction contended for by Mr. Slade and are wide enough and clear enough to require us to hold that they have the effect contended for by the prosecution. In other words, we agree with the decision of the Divisional Court in BUCKMAN *v.* BUTTON (*supra*).

We were pressed with statements contained in *Maxwell's Interpretation of Statutes* (8th ed., p. 190), following a quotation from the judgment of Wright, J., in *Re* ATHLUMNEY, [1898] 2 Q. B. 547, at p. 552: "It is chiefly where the enactment would prejudicially affect vested rights, or the legality of past transactions, or impair contracts, that the rule in question prevails. Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the Legislature, to be intended not to have a retrospective operation." We accept this statement, for which authority is to be found in many cases, some of which were cited to us (see *Re* PULBOROUGH SCHOOL BOARD; BOURKE *v.* NUTT, [1894] 1 Q. B. 725, at p. 737, and BARBER *v.* PIDGEN, [1937] 1 K. B. 664, at p. 673). Our decision is based on the language of the paragraph we have to construe. For that reason it is unnecessary to rely on any distinction or principle between words which

create new offences and words which increase the penalties for offences already committed.

We dismiss the appeal both against conviction and against sentence.

Appeal dismissed.

Solicitors: **Franklins, for appellants.**

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ATKINSON AND MR. JUSTICE CROOM-JOHNSON.

THOMAS FIELD.

1943. 29 *Nov.*

Plea of Guilty—Plea Entered under Misapprehension—Indictment Bad in Law—Conviction Quashed.

Conviction of prisoner who had pleaded guilty quashed, on the ground that the plea had been entered under a misapprehension and that the indictment was bad in law.

Appeal against conviction and sentence.

The appellant pleaded guilty at Warwickshire Sessions on October 12, 1943, to aiding and abetting concealment of birth and was sentenced by the Deputy Chairman to six months' imprisonment.

The appellant was indicted together with his two daughters Gwendoline Amy and Ethel Mary. The indictment charged them that they "did endeavour to conceal the birth of a child of which the said Gwendoline Amy Field had been delivered by secretly disposing of the dead body of the said child". Both pleaded guilty. The indictment charged the appellant that he "did aid and abet Gwendoline Amy Field

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and Ethel Mary Field in endeavouring to conceal the birth of a child of which the said Gwendoline Amy Field had been delivered, namely, that he, with knowledge of the misdemeanour aforesaid, did maintain secrecy thereof and did receive, harbour and maintain the said Gwendoline Amy Field and Ethel Mary Field, well knowing that they had lately before secretly disposed of the dead body of the said child". The appellant, who was not represented, said: "I am guilty of harbouring", and in reply to a question by the Deputy Chairman: "Do you want to admit that when you knew about this happening you helped the people concerned?" said: "Well, I did help the people concerned". The case disclosed by the depositions was that about 8.15 a.m. one morning in August, 1943, Gwendoline Amy Field was delivered of a still-born child; that she asked her sister Ethel to burn the body and that Ethel forthwith put it under a copper-hole and burnt it; that the appellant first learned that the body had been burnt when he returned home from work that afternoon, and that he then told Ethel not to say anything about it. He stated that he had not known that Gwendoline was expecting a baby.

T. R. Fitzwalter Butler, for the appellant:

The indictment was bad in law. The essential ingredient of the offence is a secret disposition of the dead body, and the only way in which the appellant could have aided and abetted the offence was by aiding and abetting the secret disposition of the body. The indictment, however, purports to charge him with aiding and abetting by misprision of a misdemeanour or by being accessory after the fact to misdemeanour, offences which are unknown to the law. He obviously pleaded guilty under a misapprehension, and the depositions disclose no offence on his part. [He was stopped.]

R. H. Blundell, for the Crown, did not seek to support the conviction.

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THE LORD CHIEF JUSTICE: The first observation which I think it is proper to make is that there seems to have been a misapprehension of the plea which the appellant desired to make. He said that it was quite true that he had assisted his two daughters and the learned Deputy Chairman treated that as a plea of guilty to the offence with which he was charged. That seems to us to have been a mistake, and that alone would probably have been sufficient to make it impossible to support this conviction.

But the form of the indictment presents other difficulties. The facts were that the child was born in the absence of the appellant. The sister of the mother was at once aware of the birth. The child was stillborn, and was forthwith disposed of by burning. Some eight hours or more afterwards the appellant was made aware of the disposal of the body, and did nothing more than the negative acts of failing to turn his daughters out of doors, or of failing to give some information to the police. He was apparently charged with aiding and abetting the concealment of birth. It need hardly be said that the disposal of the body is an essential factor in the offence of concealment of birth. There is, in our opinion, no evidence upon which he could have been held to have aided and abetted the disposal of the body, and he could not have been charged as an accessory after the fact, as the offence is a misdemeanour. In our judgment, this conviction must be quashed.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ATKINSON AND MR. JUSTICE CROOM-JOHNSON.

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WILLIAM STIRLAND.*

Evidence—Character of Prisoner—Character Put in Issue—Statement by Prisoner that he had Never been Charged with any Offence—Cross-examination on Suggested Accusation by Former Employer—Questions Relevant on Credibility—Conviction Affirmed.

The appellant, who was charged with forgery and kindred offences, put his character in issue and specifically stated that he had never before in his life been charged with any offence. In cross-examination he was asked questions about his previous employment at a bank and the reasons for the termination of that employment. After he had said that he left because the bank disapproved of certain of his outside interests and because he had the opportunity of other employment which appealed to him, the following cross-examination took place. "(Q.) May I suggest another reason to you? Were you questioned about a suggested forgery? (A.) No. (Q.) Did you leave after an interrogation about a particular signature? (A.) I did not."

Held, that the cross-examination was relevant and admissible as going to the credibility of the appellant.

MAXWELL, 25 Cr. App. R. 152; [1935] A. C. 309, considered.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on October 12, 1943, of forgery and of obtaining and attempting to obtain money by forged instruments and was sentenced by the Common Serjeant to three years' penal servitude.

* A fiat was granted by the Attorney-General for leave to appeal to the House of Lords in this case. The appeal was heard on December 20, 1943, and dismissed. The Lord Chancellor stated that the reasons for their Lordships' decision would be given at a later date, and a full report will in due course appear in these Reports.

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The appellant was employed by the British Broadcasting Corporation for three years ending on December 31, 1942. The case for the prosecution was that on that date he stole six sets of order forms and forged them; that he then had orders made out, retaining the top copies himself and planting duplicates in the appropriate departments of the Corporation; and that after he had left their service, on various dates up to June, 1943, he sent in from accommodation or bank addresses invoices representing work done or goods supplied, in some cases obtaining, and in other cases attempting to obtain, cheques from the Corporation.

The appellant put his character in issue, and specifically stated that he had never before in his life been charged with any offence. In cross-examination he was asked a number of questions about his employment at a bank, whether he had there become some sort of an expert in handwriting, and why that employment was terminated. The appellant stated: "The first reason [for the termination of the employment] was that I had other interests outside the bank, which the bank did not like, and they were entirely literary interests, when I came to London. The second reason was that I had the offer of an opportunity in London of going in for advertising, and therefore I resigned from the Westminster Bank and came to London." The following further cross-examination took place: "(Q.) May I suggest another reason to you? Were you questioned about a suggested forgery? (A.) No. (Q.) Did you leave after an interrogation about a particular signature? (A.) I did not."

G. Crispin and *D. H. Figg*, for the appellant:

The cross-examination of the appellant suggesting that he had been charged by the bank with another offence offended against the principle laid down by the House of Lords in MAXWELL *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 25 Cr. App. R. 152; [1935] A. C. 309, and followed in the cases of WADEY (1935), 25 Cr. App. R. 104; SUGARMAN (1935), 25 Cr. App. R.

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109, and SAVORY (1942), 29 Cr. App. R. 1. No objection was taken to the questions at the time, as it was not known whether the prosecution would seek to call evidence of the appellant's alleged bad character by way of rebuttal. It is true that the Common Serjeant directed the jury that they ought to regard the appellant as a man of unblemished character, but once the questions had been asked the mischief done was incurable: MORRISSEY (1932), 23 Cr. App. R. 188.

J. Scott Henderson, for the Crown:

The present case is different from MAXWELL (*supra*) and other cases relied on by the appellant, because here the questions asked went directly to appellant's credibility (a) on the issue whether he had ever been charged with an offence; (b) on the issue whether he had a good character. The appellant having said "I have never been charged with any offence", it was open to question him about a possible charge. The prosecution would be bound by his answers, unless they were able to call evidence of his general bad character in rebuttal. In any event, in view of the manner in which the Judge dealt with the matter in his summing-up, no harm can have arisen from the questions to which objection is now taken, and the case against the appellant was an overwhelming one.

ATKINSON, J.: This appeal raises the issue whether questions put to the appellant in cross-examination were properly put. He was charged with a series of very elaborate forgeries. The Court has read the evidence with very great care and, to put it mildly, there was a very strong case against the appellant.

Immediately after being called, the appellant was asked this question: "Have you ever before in your life been charged with any offence?", and he answered "No". It is conceded that that question put his character in issue. His character had already been put in issue by questions put in cross-

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examination to some of the witnesses for the Crown, but this put it in issue in a particular way and on a high level.

[His Lordship referred to the cross-examination of the appellant set out above, and continued:] It is perfectly plain that those questions were directly relevant to the answer which the appellant had given that he had never in his life been charged with any offence whatever. Either the questions suggest that there had been some sort of a charge made against the appellant or they do not. If they do not, there is no objection to them; but if they do, it seems to the Court that they were quite properly put by way of testing his credibility. He chose to say a certain thing, and then questions were asked which tended to show that what he said was untrue. If the appellant's answer had been "They did charge me with the suggested forgery", it is conceded that there would be no objection, but it is said that because the appellant's answer was "No" the questions were improper. The Court cannot take that view. If an accused person chooses to pitch his character as high as this appellant did, it seems to the Court that he cannot object to questions tending to throw doubt on the truth of that evidence. That is the main ground on which the Court thinks that this appeal must fail. But I must add a word about MAXWELL *v.* DIRECTOR OF PUBLIC PROSECUTIONS (*supra*), because again and again in that case the House of Lords was careful to say that questions directed to credibility are admissible, but that the danger to be guarded against by a Judge is the danger of a question being of such a character that the jury might think that the prisoner is a man who is likely to commit the crime with which he is charged. For instance, the Lord Chancellor (Lord Sankey) said (25 Cr. App. R., at p. 173; [1935] A. C., at p. 320): "There may still be cases in which a prisoner may be asked about a charge as a step in cross-examination leading to a question whether he was convicted on the charge, or in order to elicit some evidence as to statements made or evidence given by the prisoner in the course of a trial on a charge which failed, which tend to throw

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doubt on the evidence which he is actually giving." That is the point here. The appellant was actually giving evidence: "I have never been charged with anything", and it was perfectly proper to ask him the questions to which objection is taken.

There are other matters which it might have been necessary to consider. In WATTAM (1941), 28 Cr. App. R. 80, the present Lord Chief Justice repeated what had already been said twice by Lord Hewart, that a condition which is necessary to be satisfied before a conviction can be quashed on grounds of this kind is that "an application by counsel for the prisoner for the trial to be begun again before another jury must be made". In the present case no objection was taken to the questions at the time.

There is the further point that the Common Serjeant warned the jury most emphatically to confine themselves to the evidence relating to the actual charges, and forget all questions directed to any suggestion of other charges. We do not see how he could have put the point more clearly. Apart from that, the evidence was of a most overwhelming character, and the Court is quite satisfied that these questions led to no injustice of any kind. The appeal, therefore, fails.

Appeal dismissed.

Solicitors: J. H. Milner & Son, for appellant; E. C. Robbins, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE MACNAGHTEN AND MR. JUSTICE TUCKER.

ERNEST ISAAC WOODWARD.

1943.
8 *December.*

Defence of Prisoner—Right to Conduct Personally—Counsel Assigned against Prisoner's Will.

Where at the beginning of a trial a prisoner expresses a desire to conduct his own defence, he should be allowed to do so and counsel should not be assigned to him against his will. If, however, counsel has begun to conduct the defence of a prisoner and has cross-examined witnesses, still more if he has addressed the jury for the defence, a prisoner should not then be allowed to dispense with the services of counsel and take over his own defence.

Appeal against conviction.

The appellant was convicted on October 9, 1943, at Birmingham Quarter Sessions of larceny and receiving stolen property and was sentenced by the Assistant Recorder to twelve months' imprisonment with hard labour.

Counsel was assigned to the appellant prior to the trial under the Poor Prisoners' Defence Act, 1930. As that counsel was unable to appear, the brief was handed to another counsel, who did not have the opportunity of interviewing the appellant. After arraignment, the appellant said that he would rather not have legal aid and would prefer to conduct his own defence. The Assistant Recorder told him that he was in the hands of counsel. At a later stage the appellant twice intervened to make observations or to ask questions of a witness, but was again told that he was in the hands of counsel and would be well advised to leave matters to counsel's discretion.

T. K. Edie, for the appellant:

The appellant, who had applied for legal aid and had had counsel assigned for his defence under the Poor Prisoners'

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Defence Act, 1930, changed his mind and wished to conduct his own defence as he had not been able to have a conference with the counsel who at the last moment had been briefed for his defence. However, he was not allowed by the presiding Judge to conduct his own defence, and a great injustice was thereby done to him. A person charged with a criminal offence is entitled to conduct his own defence even though he has applied for legal aid and a counsel has been assigned. Further, the Judge misdirected the jury in the summing up as he confused the two charges of stealing and receiving and did not distinguish between the evidence which was necessary to prove the two offences.

J. L. Gamgee, for the Crown:

Where a person charged with a criminal offence has applied for legal aid and a counsel has been assigned to him, he cannot afterwards change his mind, repudiate the counsel assigned to him, and claim the right to defend himself. Cockburn, C.J., in the course of the argument in MAYBURY (1865), 11 L. T. 566, said: "Clients must adopt one of two courses, they must decide at first, and either conduct their cases in person, or place themselves in the hands of their counsel." Later in his judgment he said: "I am quite prepared to say that when a case is fairly before the Court, and counsel is seised of it, his authority cannot be revoked." There was no misdirection in the present case.

THE LORD CHIEF JUSTICE: This case is a somewhat unusual one, because the appellant complains that he was convicted after a trial at which, against his will, he was forced to have counsel to defend him. Counsel had been assigned to him under the Poor Prisoners' Defence Act, 1930, but the counsel who had been assigned was obliged to return his brief. The papers were then handed to another counsel, and after the appellant had been arraigned this counsel stated that he appeared for the appellant. The appellant then said that he would rather not have legal aid, and would prefer

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to conduct his own defence. The Assistant Recorder, however, told him that he was in the hands of counsel, to which the appellant said: "I think I ought to be allowed to conduct the case myself." At a later stage the appellant twice intervened to make observations or to ask questions of a witness. He was again told that he was in the hands of counsel and would be very well advised to leave matters to counsel's discretion. It has been argued to-day by counsel for the Crown that, once counsel has been briefed and seised of a case, whatever that may mean, an accused person is not in a position to repudiate his counsel and claim the right to conduct his own case.

In our opinion, no person charged with a criminal offence ought to have counsel forced on him against his will. If, however, counsel had begun to conduct a case and had dealt with a number of witnesses, still more if he had addressed the jury for the defence, a prisoner would not then be in a position to say that he wished to take over his own defence. Nothing of that kind took place in the present case. At the beginning of the trial the appellant said that he wanted to defend himself, on the intelligible ground that he had not had an opportunity of seeing counsel, and he was refused what, in the opinion of the Court, was his right to conduct his own case. We have been referred to MAYBURY (1865), 11 L. T. 566, in which something was said by Cockburn, C.J., on the necessity for clients to adopt one of two courses, either to conduct their cases in person or place themselves in the hands of counsel. I find it difficult to derive much assistance from that observation of Cockburn, C.J., which was made with reference to the facts of that case, because it appears that counsel desired to withdraw from the case and was allowed to do so, with the result that the client then addressed the Court on his own behalf.

In our opinion, the refusal of the Assistant Recorder to allow the appellant to claim his right was wrong and resulted in an injustice to the appellant.

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[The Court then considered the summing-up of the Assistant Recorder, and held that in the circumstances the conviction ought not to stand.]

Conviction quashed.

Solicitors: Beale & Son, Birmingham, for the Crown.

BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE ASQUITH AND MR. JUSTICE CASSELS.

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GEORGE EDWARD TUNE.

Charge after Caution—Statement by Prisoner—Comment by Judge.

It is probably better, where a person has been charged with a criminal offence after having been cautioned and has either made no answer at all, or has made some observation which in itself is not in the nature of an explanation of the charge, that the presiding Judge should say nothing about it, beyond telling the jury exactly what was said or not said on that occasion.

LECKEY (29 Cr. App. R. 128; [1944] 1 K. B. 80) and NAYLOR (23 Cr. App. R. 177; [1933] 1 K. B. 685) referred to.

Application for leave to appeal against conviction and sentence.

The applicant was convicted at the Central Criminal Court on October 27, 1943, of the fraudulent conversion of three sums of money amounting in all to £972, and was sentenced by the Commissioner to four years' penal servitude.

The applicant, on being interviewed by the police after caution with regard to the three charges, made a statement in which he admitted that he had been shown various documents by the police, but gave no explanation and at the

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end said: "I can fully explain the whole question, but would prefer to have advice before doing so in writing." The Judge referred to that statement in his summing-up and made the following comment: "Members of the jury, could not that have been said without legal advice?"

W. M. F. Hudson, for the applicant:

The Judge's comment on the failure of the applicant to make any statement in answer to the charges was a misdirection, in that it invited the jury to draw a conclusion adverse to the applicant from the fact of his silence. Comments of this kind were held to be misdirections necessitating the quashing of the convictions in NAYLOR (23 Cr. App. R. 177; [1933] 1 K. B. 485) and, very recently, in LECKEY (29 Cr. App. R. 128; [1944] 1 K. B. 80).

No counsel appeared for the Crown.

HUMPHREYS, J., (after stating the facts and stating that, in the opinion of the Court, the sentence was not too severe): The applicant's only ground of application for leave to appeal is that the Judge in the course of his summing-up misdirected the jury by commenting unfavourably on the applicant's statement to the detective-sergeant that he would prefer to have advice before explaining the three transactions about which the officer questioned him. The officer had interviewed the applicant and mentioned the various amounts of the sums alleged to have been fraudulently converted, in reply to which the applicant expressed the desire to make a statement, and proceeded to make a statement in writing. In that statement he admitted that he had been shown various documents by the police which purported to show certain things, but gave no explanation, and said at the end that he could fully explain the whole question, but would prefer to have legal advice before doing so in writing. The Judge in summing-up the case to the jury commented on that in this way. He read the statement, which begins: "I have been cautioned that

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anything I say will be taken down in writing and may be given in evidence in any charge which may follow. I have been told by Detective-Sergeant Christopher that there is a sum of over £3,000 withdrawn from the Post Office Savings Bank account at Bearwood which has not been satisfactorily explained. My reply to that is that since November last I have made many requests to be allowed to explain it, but up to now I have not been given the opportunity to do so." Then the Judge says: "Well, members of the jury, there are the two long letters you have heard referred to and it is for you to say whether that and other opportunities had been given." It was quite untrue to say, in point of fact, that he had been refused opportunities; he had been invited to explain over and over again, but he had never given an explanation. Then the Judge says: "Then he goes on to particularise about the various drawings which were referred to" and he repeats what appears in the statement: "I can fully explain the whole question, but would prefer to have advice before doing so in writing." The comment which the Judge thought right to make, and in our view it was a perfectly reasonable comment to make in the circumstances, was merely this: "Members of the jury, could not that have been said without legal advice?"

We have been asked to say that that was a misdirection in the sense that it was inviting the jury to form some adverse conclusion from the fact that the applicant did not give an explanation. It was nothing of the sort. It was merely a comment that what the applicant was saying, if it was true, was something that did not require any legal advice. In our view, that is not objectionable, and certainly not objectionable in the sense in which the statement which was the subject of an appeal in LECKEY (29 Cr. App. R. 128; [1944] 1 K. B. 80) was held to be objectionable. In that case this Court came to the conclusion that the conviction must be quashed because of the improper comments of the presiding Judge on the failure of the prisoner to make any answer to the charge

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which was made against him after caution. LECKEY (*supra*) was in fact decided on the ground that it was indistinguishable from the previous case of NAYLOR (23 Cr. App. R. 177; [1933] 1 K. B. 685), which was a very strong case indeed.

This Court thinks it right, in refusing this application, as we do on the ground that there was no misdirection, to make this observation: It is probably better, where a person has been charged with a criminal offence after having been cautioned and has either made no answer at all, or has made some observation which in itself is not in the nature of an explanation of the charge, that the presiding Judge should say nothing about it beyond telling the jury exactly what was said or not said on that occasion, because many observations of different sorts by learned Judges have from time to time been made the subject of appeals to this Court. If nothing is said by way of comment by the presiding Judge, no point can be raised. So far as this case is concerned, we are quite satisfied that there was nothing improper in the very harmless comment which was made by the learned Judge. The application for leave to appeal against conviction is refused.

Application refused.

Solicitor: W. R. Perkins, for applicant.

BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE ASQUITH AND MR. JUSTICE CASSELS.

FRANCIS JOHN RUSSELL.

1944.
18 *January.*

Larceny—Evidence Disclosing Case of False Pretences—Jury Told to Treat Case as One of False Pretences—No Opportunity Given to Defending Counsel to Address Jury on False

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FRANCIS JOHN RUSSELL.

Humphreys, J., Asquith, J., Cassels, J.

Pretences—False Pretences not Specified in Writing—No Miscarriage of Justice.

On a charge of larceny, the case was presented by the prosecution as one of larceny by a trick. After the evidence had been concluded and counsel for the defence had addressed the jury, the presiding Judge told the jury that he would direct them to return a verdict of not guilty of larceny and ask them to consider the case as one of obtaining money by false pretences; but he did not give defending counsel an opportunity of applying to be allowed to address the jury on this charge or of applying to have the alleged false pretence specified in writing. The jury convicted on the charge of false pretences.

Held, that although it might have been proper to give defending counsel an opportunity of making such applications, in the present case no miscarriage of justice had occurred by reason of such omission and the conviction must be affirmed.

The applicant was convicted on November 16, 1943, at the County of London Sessions of obtaining money by false pretences and was sentenced by the Deputy Chairman to two years' imprisonment with hard labour.

The material facts appear fully in the judgment.

No counsel appeared on either side.

HUMPHREYS, J: The applicant was convicted at the London Sessions before the Deputy Chairman upon an indictment which charged him with stealing, and the particular case of stealing alleged was undeniably what is called larceny by a trick. The applicant pretended that there was somebody who had possession of a great many sacks of the sort that are used in Covent Garden Market which he was prepared to sell for a certain sum of money, and obtained the money to pay for them from the man who thought he could make a fair profit if he bought them. He then persuaded that man or his representative to go in a cab to Covent Garden, and when in one of the streets near Covent Garden stopped the cab and said: "I will just go and get the receipt for the money. If you will give me the money, I will come back in a minute and

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we will get the sacks." Having got the money, which was quite a large amount, £250, the applicant disappeared with it. On those facts he was charged with stealing that money by means of a trick. There is no ground for interfering with that conviction, but one ground which he raises requires a word of explanation. At the close of the case for the prosecution, and indeed after the whole of the evidence had been concluded, including that of the applicant himself, and after the speech of counsel for the defence, the Deputy Chairman made this statement: "Members of the jury, the charge against the prisoner is that on August 25 he stole the sum of £250, the property of John Williams Green. Now I do not think on this evidence that is the right charge, because if the defendant is guilty at all he is guilty of obtaining money by false pretences with intent to defraud. But the law does not allow you to find a verdict of guilty on a count for larceny where larceny is not really the right charge, and I am going to direct you to say that he is not guilty of larceny, and to consider only whether he is or is not guilty of obtaining money by false pretences with intent to defraud".

The learned Deputy Chairman then quite correctly summed up the evidence in the case, and this Court agrees with him that upon the particular evidence in this particular case it was a proper course to tell the jury that the real issue in the case was whether the applicant obtained money by false pretences. But it would have been open to counsel who appeared for the applicant at the trial to ask that he might be allowed to address the jury again, because he had never had any opportunity of addressing them on the question whether the applicant made the false pretence with intent to defraud. When he addressed the jury he had only dealt with the question whether it was proved that the applicant had stolen by means of a trick. He might or might not have desired to address the jury on false pretences. Counsel might also have made an application of this nature: "If this is going to be treated as a case of obtaining money by false pretences,

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I want to know what is the false pretence alleged, and I want it put into writing, because if the applicant had been indicted for false pretences the prosecution would have been bound to state in the indictment the false pretence on which they relied." That application might have been made, but it was not, and inasmuch as it was not, we think that the applicant cannot be allowed to have leave to appeal against his conviction merely on the ground that the learned Deputy Chairman did not give an indication to the applicant's counsel, as he might well have done, which would have enabled counsel to make another speech if he wished to do so, or make an application of the nature which I have indicated. We might take a different view of the matter perhaps in a case where the evidence was not very strong, but in this case the evidence was overwhelming. A number of perfectly respectable people engaged in a perfectly legitimate transaction, that is to say, they obtained, rather luckily, a quantity of sacks and by clubbing their money together they could manage to make a decent and a perfectly legitimate little profit. They were defrauded of their money by a rogue who pretended that there was somebody he knew who would deliver the sacks, and by the false pretence that there was somebody with whom he had arranged that the sacks should be delivered he obtained their money. The evidence was overwhelming. That being so, it is quite clear there was no miscarriage of justice. The jury were not misled; on the contrary, they were told correctly the legal aspect of the matter. Therefore, the application for leave to appeal is refused.

Application refused.

BEFORE

MR. JUSTICE LAWRENCE, MR. JUSTICE LEWIS AND MR. JUSTICE WROTTESLEY.

WILLIAM JAMES CROFT.

1944.
20, 21 *Jan.*

Murder—Suicide Pact—Survivor not Present at Suicide of Other Party—Accessory before the Fact—No Express Countermand of Advice Previously Given—Liability.

Where there is a mutual agreement to commit suicide, the agreement amounts to such a counselling, procuring, inducing, advising or abetting of murder as constitutes the survivor an accessory before the fact if he is not present when the other party to the agreement commits suicide.

Where a person has acted as accessory before the fact to a felony, in order that he should escape from liability as an accessory, he must give express and actual countermand or revocation of the counselling, procuring, etc., which he has previously given.

Appeal against conviction.

The appellant was convicted on December 14, 1943, at Hampshire Assizes of the murder of Joan Norah Lewis, and was sentenced by Humphreys, J., to death.

The appellant, who was a married man, was an officer in the Royal Air Force, and was stationed at the same station as the deceased woman. They had formed a passionate attachment, and in October, 1943, she was due to be posted to another station. They spent the night of October 14 in a summer-house, and during the night the deceased woman fired two shots from the appellant's revolver, which he had brought to her loaded in every chamber and cocked. The second shot proved fatal. The applicant stated in his evidence that, after the woman had fired the first shot and wounded herself in the breast, he had gone, at her request, for help.

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Humfrey Edmunds, for the appellant:

The issue of manslaughter should have been left to the jury. The substantial ground of appeal, however, is that the Judge was wrong in directing the jury that the mere existence of a suicide pact meant that the survivor was necessarily guilty of murder. The authorities show that, in order to render the survivor guilty of murder, he must be present aiding and abetting at the time when the other party commits suicide. [He referred to DYSON (1823), 1 R. & R. 523; ALISON (1838), 8 C. & P. 418; JESSOP (1877), 16 Cox 204; STORMOUTH (1897), 61 J. P. 729; ABBOTT (1903), 67 J. P. 151; and SYMONDS (1922), *Times Newspaper*, December 19.] If the jury accepted the appellant's evidence, he had left the summer-house before the fatal shot was fired and would not in that event be liable either as a principal in the second degree or an accessory before the fact. Further, at the time when the fatal shot was fired any agreement to commit suicide had come to an end, if the jury accepted the appellant's evidence that after the firing of the first shot she asked him to get help, thereby showing her wish to live.

John Maude, *K.C.*, and *J. Scott Henderson*, for the Crown:

Even if the appellant's own evidence be accepted, there was no satisfactory evidence that the appellant did anything after the firing of the first shot to revoke the suicide pact, or to tell the deceased woman that it was his wish that she should not die. He did not even secure the revolver with which the first shot had been fired before leaving the summer-house. There is no authority to the effect that if the survivor to a suicide pact is absent at the time of the suicide of the other party he is not an accessory before the fact, and there is an *obiter dictum* in SYMONDS (*supra*) to the contrary. The authorities decided before 1861 can have little bearing on the law of to-day, as before that date a person could not be convicted as accessory before the fact until the principal felon was convicted; therefore, where the principal felon had

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committed suicide, the other party to a suicide pact could not be tried as an accessory before the fact. Under the law as it stands to-day, a mutual agreement to commit suicide constitutes the survivor an accessory before the fact, and he remains an accessory unless there has been a direct countermanding of the agreement.

LAWRENCE, J. (after stating the facts): It is contended that a person who enters into an agreement with another to commit suicide does not thereby become an accessory before the fact because the mere agreement is not such a counselling or advising or procuring or abetting as would make him an accessory before the fact if in fact he was not present when the suicide was committed. A number of cases were referred to: DYSON (1823), 1 R. & R. 523; ALISON (1838), 8 C. & P. 418; JESSOP (1877), 16 COX 204; STORMOUTH (1897), 61 J. P. 729; ABBOTT (1903), 67 J. P. 151, and, lastly, SYMONDS (1922), *Times Newspaper*, December 19. It is perfectly true that in all those cases the prisoner was present and was charged as an aider and abettor; the distinction between aiders and abettors and accessories before the fact being, of course, that aiders and abettors are present, and accessories before the fact are absent. As Mr. Maude has pointed out to us, it was impossible before 1861 to have a case in which an accessory before the fact could be so treated if it was a case of suicide, because it was necessary before that date that the principal felon should have been convicted first, and as the felon had already died, he could not be convicted. Therefore, all those cases were cases not of accessories before the fact but of aiders and abettors. In SYMONDS in 1922, the prisoner had been present at the commission of the offence. The Lord Chief Justice (Lord Hewart), delivering the judgment of the Court consisting of himself, Darling, J., and Salter, J., said (though it was only by way of *obiter dictum*) that if the survivor of a suicide pact was absent at the time of the suicide of the other party he would be an accessory before the

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fact. He said that, in a case in which a survivor is not present when an agreement is acted upon, he is an accessory to the crime. In the present case the whole of the learned Judge's summing-up was based upon the evidence that there was an agreement, and he put it to the jury that that was an essential element for them to find, that there was a mutual agreement to commit suicide. Where there is such a mutual agreement to commit suicide, we are of opinion that that amounts to such a counselling, procuring, inducing, advising or abetting as constitutes the person who agrees an accessory before the fact if he is not there when the other party to the agreement commits suicide. The words of description of an accessory before the fact are very wide, as is shown by *Russell on Crimes* (9th ed.), Vol. II, at p. 1481, and the following pages, where he cites two authorities, *Hawkins' Pleas of the Crown* and *Hale's Pleas of the Crown.*

Another point which Mr. Humfrey Edmunds alluded to to-day was the possibility of manslaughter, and he referred to MANCINI (28 Cr. App. R. 65; [1942] A. C. 1), where the Lord Chancellor, Lord Simon, said this (28 Cr. App. R., at p. 73; [1942] A. C., at p. 8): "To avoid all possible misunderstanding, I would add that this is far from saying that in every trial for murder, where the accused pleads not guilty, the Judge must include in his summing-up to the jury observations on the subject of manslaughter. The possibility of a verdict of manslaughter instead of murder only arises when the evidence given before the jury is such as might satisfy them as the judges of fact that the elements were present which would reduce the crime to manslaughter, or, at any rate, might induce a reasonable doubt whether this was, or was not, the case." In the present case there was no evidence, and no suggestion of any evidence, which could possibly, in our opinion, have induced any reasonable jury to take the view that when the second shot was fired, it was fired by reason of provocation, legal provocation, which could reduce the crime from murder to manslaughter.

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Lastly, counsel for the appellant complains—although I do not understand that the point had ever been taken in the Court below—that the summing-up does not contain any reference to the possibility of the agreement to commit suicide having been determined or countermanded. It is quite true that the learned Judge does not deal expressly with that except in a passage which is not exactly upon that point, where he says: "Even if you accept his statement in the witness-box that the vital and second shot was fired when he had gone through that window, he would still be guilty of murder if she was then committing suicide as the result of an agreement which they had mutually arrived at that that should be the fate of both of them, and it is no answer for him that he altered his mind after she was dead and did not commit suicide himself." That passage, it is true, does not deal with the exact point which Mr. Humfrey Edmunds was raising, but the authorities, such as they are, show in our opinion that where a person has acted as an accessory before the fact, in order that he should not be held guilty as an accessory before the fact, he must give express and actual countermand or revocation of the advising, counselling, procuring or abetting which he had given before. We are of opinion that the circumstances in this case did not amount, and could not have been reasonably held to amount, to such a clear countermand as would discharge the prisoner from the liability to a charge of murder if that which occurred was as the result of what he had done before. He had been in the summer-house all night long with the woman who was killed; he had brought to her his revolver; he had loaded it and he had cocked it; he had loaded it in every chamber and they were in the dark. All he did, according to his evidence, when she shot herself through the breast and cried out in pain and told him to get some help, was to put his hand to her breast and then get out of the window. He never said anything to her which could have removed from her mind the effect of the counsel which he had given her before. He does not say that he

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said anything to her; and he left her wounded, possibly fatally wounded, with the revolver loaded in all chambers except the one which had been fired. In our opinion, that conduct cannot be held to be such a countermanding or determination of an agreement to commit suicide as would entitle him to an acquittal

We are, therefore, of opinion that this conviction cannot be quashed for that reason. The summing-up must be looked at as a whole, and, looked at as a whole, in our opinion, it was a fair and full summing-up. It put to the jury every material point which had been made on behalf of the appellant.

For these reasons we think that this appeal must be dismissed.

Appeal dismissed.

BEFORE

MR. JUSTICE LAWRENCE, MR. JUSTICE LEWIS AND MR. JUSTICE WROTTESLEY.

1944. 21, 24, 25 *January.*

JANINE GILSON.
CISSIE COHEN.

Larceny—Claim of Right—Omission from Definition of Offence in Summing-up—Questions by Judge during Examination-in-Chief of Prisoners.

Convictions of larceny quashed in a case where the substantial defence of the defendants was that they had obtained the money alleged to have been stolen under a *bona fide* claim of right and the Judge, in defining larceny in his summing-up, omitted from the definition the words "fraudulently and without a claim of right made in good faith".

It is undesirable that the examination-in-chief of a prisoner by his counsel should be constantly interrupted by cross-examination from the Judge. Where, however, a Judge finds it necessary to intervene in the course of the examination-in-

chief of a prisoner with questions which suggest that the evidence of the witness is not to be believed, he should remind the jury that the question of believing or not believing any particular witness is, like all other matters of fact, a question for them.

CAIN (1936), 25 Cr. App. R. 204 approved and followed.

1944. 21, 24, 25 *January*.

JANINE GILSON. CISSIE COHEN.

Lawrence, J., Lewis, J., Wrottesley, J.

Appeals against convictions and sentences.

The appellants were convicted on November 29, 1943, at the Central Criminal Court of larceny and were each sentenced by the Commissioner (Judge McClure) to nine months' imprisonment.

The appellants were both prostitutes and were accused by a merchant seaman named Scarborough of stealing £16 from his clothes while he was in their company in the appellant Gilson's flat. It was common ground that the appellant Cohen met Scarborough in Piccadilly and that he agreed to pay her £2 for the gratification of his lust. The appellant Cohen took him to the appellant Gilson's flat and there asked for £2, which he paid over in four 10s. notes. Scarborough's evidence was that she asked for £1 notes instead, which he gave her and received back the 10s. notes; that she refused to allow him to have connection with her, owing to his physical condition, but said that she would fetch her friend, who would bring some obscene photographs; that the appellant Gilson then appeared with the photographs, and indecent acts took place, during which the appellant Cohen was seen by Scarborough to take £16 of his money from the pocket of his trousers, which were lying on the floor; that after some time he demanded his money back, and a violent scene occurred, and in the end the appellant Cohen fetched a uniformed constable. The appellant Cohen gave evidence to the effect that Scarborough asked to be allowed to stop the night; that she said "Yes, for £10," whereupon he gave her a further £10, and that the appellant Gilson then came into the room. Both appellants gave evidence that Scarborough then asked the appellant Gilson to stop the night with him too

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and that eventually she agreed to allow him to stay till 2 a.m. for £6, whereupon he paid her £6. Both appellants said that Scarborough desired that they should indulge in further perverted acts with him, which they refused to do; that he then threatened to break up the flat and beat them if he did not get his money back; and that it was in those circumstances that the constable was fetched. The constable gave evidence that he arrived about 11 p.m. and that Scarborough then said: "I want to prosecute these women. They have stolen £16 from my trousers pocket. The small one (indicating Cohen) took the money from my pocket. I think she has given some of it to the other woman"; that the appellant Cohen said: "I have had £18 from the man; he gave me £2 at first and afterwards he gave me £16 to have a good time and stay the night. . . . He agreed to this and I gave £6 of £16 to Gilson"; and that Gilson said: "That's right; he gave us the money and I had £6 of it." The two appellants stated that they were entitled to the money as they were prepared to carry out the agreement and, whilst they admittedly had the money, they were not prepared to hand it back; they were then taken to the police station and charged with larceny.

Sir Charles Doughty, K.C., and *J. A. S. Toogood*, for the appellant Gilson:

The substantial defence of the appellant was that she had a *bona fide* claim of right to the money alleged to have been stolen. If she had such a claim, it mattered not that the claim was unfounded. [He referred to BERNHARD, 26 Cr. App. R. 137; [1938] 2 K. B. 264.] When the Judge was dealing in his summing-up with the definition of larceny, he gave an inaccurate definition, because he omitted the material words which are found in section 1 of the Larceny Act, 1916, "fraudulently and without a claim of right made in good faith". The summing-up did not give a consecutive account

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of what the evidence showed to have taken place and omitted to refer to inconsistencies in the evidence for the prosecution.

Linton Thorp, K.C., and *C. G. L. Du Cann*, for the appellant Cohen:

The learned Commissioner gave an incomplete definition of larceny. The indictment was laid under section 13 of the Larceny Act, 1916, as stealing in a dwelling-house. Section 1 defines stealing for the purposes of that Act. Section 1 is declaratory of the common law, hence either a correct definition at common law must be given or section 1 explained to the jury. The words "fraudulently and without a claim of right made in good faith" or equivalent words are essential; otherwise the question of *mens rea* cannot be understood by the jury. *Animus furandi* must be left to the jury: FARNBOROUGH, [1895] 2 Q. B. 484; followed in BERNHARD, 26 Cr. App. R. 137; [1938] 2 K. B. 264. The charge to the jury in this case was no more than a summing-up in an action for conversion at *nisi prius*. The claim of right set up by the appellants throughout was not left to the jury as it should be, as, no matter how erroneous in fact or fallacious in law, if honestly held it was a negation of *animus furandi*: BERNHAND (*supra*); CLAYTON (1920), 15 Cr. App. R. 45. The omission to leave that to the jury was fatal as in effect the defence had not been left to the jury at all. The Judge misdirected the jury in fact by stating that the prosecutor sent for the police when it was in fact the appellants who had done so and he omitted to refer to that fact as some evidence of a claim of right. The Judge also referred to the dangers which the prosecutor had been through at sea, although there was no evidence at all to that effect and in any case the prosecutor stated that he had not told the appellants anything about his experiences. It is submitted that any person accused of a crime is entitled in law at the proper time to tell his story to the jury free from any interruption by anyone at all: no authority can be cited for that proposition as it is so obvious as to require no authority. There is no objection to

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a Judge interposing a question to elucidate an equivocal answer, but he is not entitled to interpose so many questions as to interfere unduly with the line of examination-in-chief adopted by the defending counsel. On only two occasions had defending counsel been able to ask ten consecutive questions without interruption from the Bench. In the examination-in-chief of Cohen, her counsel asked ninety-nine questions, but the Judge asked seventy-nine, and when the appellant Gilson gave evidence-in-chief her counsel asked fifty-one questions, but the Judge asked fifty-seven. That was not fair to counsel and certainly unfair to defendants giving evidence on their trial. The quantity of questions by the Judge was obviously excessive, as the aggregate number of questions by counsel for the prosecution and for the defence was 847, but the Judge asked no less than 495, so virtually taking the case out of the hands of counsel to a large extent. It was the duty of the Judge to assist the defendants to state their cases, but none of the questions by the Judge was designed to do so; hence the jury must have been influenced by a belief that the Judge did not accept the defendants' account of the facts. The quality of some of the Judge's questions was objectionable, *e.g.*, he asked the appellant Cohen the question: "Is Mrs. Gilson a prostitute too?" Cohen had given no evidence against Mrs. Gilson and should not have been questioned by the Bench and so possibly exposed to hostile cross-examination at the hands of Gilson. Such a question might be admissible if asked by prosecuting counsel, but should not be put from the Bench. Reliance is placed upon CAIN (1936), 25 Cr. App. R. 204, where judicial interruptions during the examination-in-chief were deprecated. The questions from the Bench were simply hostile cross-examination and not "colourless" as explained in CAIN (*supra*). No complaint is made with regard to any questions by counsel for the prosecution, but hostile cross-examination is the rôle of counsel, not that of the Judge.

[He was stopped.]

R. H. Blundell, for the Crown:

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The summing-up did explain that the jury had to be satisfied that the taking was with the intent permanently to deprive the prosecutor of his money and, having regard to the way in which the case had been conducted, the jury would understand that to mean dishonestly and with intent to steal, but it was unfortunate the words of the definition were not followed. The appellants could not have any claim of right as the money was for an immoral consideration.

[LEWIS, J.: But the real question is did they honestly believe that they had a claim of right, as if so they could not be guilty of stealing. That was not explained to the jury at all.]

As the jury did not believe the appellants, the Court might think the proviso to section 4 of the Criminal Appeal Act, 1907, should be applied.

[LEWIS, J.: Speaking for myself, I do not think that the proviso should be applied in a case where the offence charged in the indictment was not completely explained and the main defence not referred to at all.]

Sir Charles Doughty, K.C., and *Linton Thorp, K.C.*, were not called upon to reply.

WROTTESLEY, J. (after stating the facts): One of the grounds of appeal of both the appellants—and in the view of the Court the principal ground—is that there was evidence of a claim of right, and that the Judge, although he referred to the statutory definition of larceny, omitted the words dealing with a claim of right. Larceny is defined by section 1 of the Larceny Act, 1916, in the following terms: "A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof". The Commissioner gave a definition of stealing as follows: "Stealing is the taking away of anything without the consent of the owner—in this case his money—meaning to make it

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your own, permanently to take it away from him". It is quite clear, therefore, that he left out the words "fraudulently and without a claim of right made in good faith". In this case particularly those words were of the essence of the crime charged, for both the appellants did put forward, however wrongheadedly, a claim of right. The fact that it is wrongheaded does not matter. In BERNHARD, 26 Cr. App R. 137, at p. 145; [1938] 2 K. B. 264, at p. 271, Charles, J., in giving the judgment of the Court, cited a passage from *Halsbury's Laws of England*. He said: "To the same effect is the statement of the law in paragraph 856 of the title 'Criminal Law', *Halsbury's Laws of England* (2nd ed.), vol. ix, p. 497, contributed by, among others, the late Avory, J., 'To prevent the taking from being felonious, the claim of right must be an honest one, though it may be unfounded in law or in fact'. Illustrations of this principle, which we conceive to be firmly established in our law, are to be found in HEMMINGS (1864), 4 F. & F. 50; WADE (1869), 11 Cox 549; CLAYTON (1920), 15 Cr. App. R. 45. It follows, in our judgment, the proper answer to the question which troubled at least one of the jury would have been that, if the prisoner honestly thought that she had a claim, she was entitled to be acquitted, even though she was wrong in so thinking". In this case the conduct of the appellants from the first showed a claim of right, however right or wrong, however reasonable or unreasonable. First it was put forward, as Scarborough's evidence showed, to the man himself; then it was put forward to the detective-sergeant; then it was put forward before the magistrate; and finally it was put forward at the Central Criminal Court. In the circumstances of this case, therefore, an express direction to the jury was necessary that, if they had any reasonable doubt on the question whether the appellants had a *bona fide* belief in their claim, then they ought to acquit them. On that ground alone we are of opinion that the appeal succeeds.

Much has been said in the course of the argument about

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various questions put by the Judge during the examination-in-chief of the accused persons. We adhere to every word which is to be found in CAIN (1936), 25 Cr. App. R. 204. This passage is to be found on p. 205: "The Judge began by doing something of which no one could complain. It was a long case, and he had taken a careful note, and it was quite right, so long as counsel for the defence had no objection, that the Judge should put to the defendant when giving evidence the various allegations of the witnesses for the prosecution, in order that he might deal with them. So long as they were put colourlessly, no one could object. Indeed, counsel for the defence might have thought it assisted him in his task. There is no reason why the Judge should not from time to time interpose such questions as seem to him fair and proper. It was, however, undesirable in this case that, beginning in the way which I have described, the Judge should proceed, without giving much opportunity to counsel for the defence to interpose, and long before the time had arrived for cross-examination, to cross-examine Chatt with some severity. The Court agrees with the contention that that was an unfortunate method of conducting the case. It is undesirable that during an examination-in-chief the Judge should appear to be not so much assisting the defence as throwing his weight on the side of the prosecution by cross-examining a prisoner. It is obviously undesirable that the examination by his counsel of a witness who is himself accused should be constantly interrupted by cross-examination from the Bench". That we think expresses all that the Court need say upon this trial. There is, however, this further to be said, that if a Judge finds it necessary to intervene in the course of the examination-in-chief with questions which may seem to the jury to suggest that the evidence of the witness, although given on oath, is not to be believed, it is also necessary that the Judge should remind the jury that the question of believing or not believing any particular witness is, like all other matters of fact in a criminal trial, a question for them and not for him.

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Reference has been made to the proviso to section 4 (1) of the Criminal Appeal Act, 1907. The conclusion to which we have come is that, having regard to the omission from the Judge's definition of larceny of the words relating to the claim of right, it is impossible for us to say that the jury, if they had received a full and proper direction on that aspect of the case, would nevertheless have returned a verdict of guilty.

For these reasons the appeals will be allowed and the convictions quashed.

Convictions quashed.

Solicitors: Percy, Bono & Griffith, for both appellants.

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Summing-up—Reference to Prisoner's Silence after Caution—"No Substantial Miscarriage of Justice"—Meaning—Only Reasonable and Proper Verdict One of Guilty—Proviso Applied—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 4 (1).

By section 4 (1) of the Criminal Appeal Act, 1907: "The Court of Criminal Appeal on any . . . appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside . . . provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred".

A substantial miscarriage of justice within the meaning of the above proviso has occurred where by reason of a mistake, omission or irregularity during the trial the appellant has lost a chance of acquittal which was fairly open to him. In order that the Court may apply the proviso, it is not necessary that they should be satisfied that no jury properly directed *could*

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have acquitted the appellant; they may apply it if they are satisfied that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would have been one of guilty.

COHEN AND BATEMAN (1909), 2 Cr. App. R. 197, followed and applied.

Dictum of LORD SANKEY, L.C., in WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 25 Cr. App. R. 72, at p. 92; [1935] A. C. 462, at p. 482, to the effect that the test is whether "if the jury had been properly directed they would have inevitably come to the same conclusion", commented on and explained.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on October 28, 1943, of larceny and was sentenced by the Recorder to three years' penal servitude.

The issue at the trial was one of identity, the appellant's case being that at the time of the theft he was in a part of London which was a considerable distance from the scene of the crime. At an identification parade held four days after the crime he was picked out without hesitation by three separate persons as one of the persons who had been in their company for over an hour on the day of the crime. In his summing-up the Recorder commented adversely on the appellant's silence after being cautioned.

John Maude, *K.C.*, and *T. K. Edie*, for the appellant:

The comments by the Recorder in the summing-up on the appellant's silence after caution amounted to a misdirection. [He referred to NAYLOR, 23 Cr. App. R. 000; [1933] 1 K. B. 685; LITTLEBOY, 24 Cr. App. R. 128; [1934] 2 K. B. 408; and LECKEY, 29 Cr. App. R. 123; [1944] 1 K. B. 80.]

Alban Gordon, for the Crown:

It is important to observe that the conviction in LECKEY (*supra*) was quashed having regard to the importance given to the particular comments in the summing-up. It is submitted that the present is a case where the proviso to

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section 4 (1) of the Criminal Appeal Act, 1907, might properly be applied, in view of the facts that the comments were not unduly stressed in the summing-up and the identification of the appellant as the person concerned in the crime was exceedingly strong. The *dictum* of Lord Sankey, L.C., in WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 25 Cr. App. R. 72, at p. 92; [1935] A. C. 462, at p. 482, that the proviso cannot be applied unless the Court can say that "if the jury had been properly directed they would have inevitably come to the same conclusion" must be construed having regard to the actual language of the proviso.

John Maude, K.C., in reply:

The use of the word "inevitably" in WOOLMINGTON'S CASE (*supra*) was deliberate, and means that the proviso cannot be applied unless the Court is satisfied that no jury properly directed could have acquitted the appellant.

Cur. adv. vult.

Feb. 4.—The following judgment was read.

HUMPHREYS, J.: The appellant in this case was convicted at the Central Criminal Court of stealing on August 23, 1943, in Wilson Street, Finsbury, an attaché case and £2,000, the property of a man named Chapman. It is unnecessary to recapitulate the facts of the case beyond saying that Mr. Chapman's property was in fact stolen by a trick on the afternoon of that day. The issue at the trial was one of identity, the appellant's case being that he was not concerned in the theft and had been wrongly identified as the man who had gone off with the case and the money. He alleged that at the material time he had been in a cinema in or near Piccadilly, which is a long way from Finsbury. He appealed to this Court and the only ground of appeal argued was the ground stated in these terms, that "the learned Recorder" who tried the case "wrongly invited the jury to infer the appellant's guilt from a consideration of his silence after being cautioned".

It is necessary to see what was the evidence as to the

statements made by the appellant when arrested and charged, as he was on August 27. The only police officer called was Detective-Inspector Withers who, at half-past eleven in the morning of that day, found the appellant detained at Notting Hill Police Station, where he had been taken earlier in the day by Detective Read. The evidence of Withers was that he told the appellant he would be taken to Old Street Police Station, where he would be put up for identification upon a charge of stealing £2,000 by means of a trick on August 23. The appellant was then cautioned and made no reply. He was then taken to Old Street Police Station for the identification parade, where he was picked out by three witnesses, and thence taken to Commercial Street Police Station, where he was formally charged and again cautioned. His answer was: "I am saying nothing". The appellant gave evidence on oath and agreed that he had made no reply to Withers at Notting Hill Police Station, but added that the reason was that he had already denied the charge to Detective Read, who had arrested him at his home at 9 o'clock in the morning, his words, according to him, being: "I do not know what you are talking about, I know nothing about it". As Detective Read was not called as a witness, the appellant's evidence on this matter stood uncontradicted. He added that at Commercial Street Police Station he had not said: "I am saying nothing", but "I know nothing", obviously a very different thing, as counsel for the prosecution agreed when cross-examining the appellant.

Now the passage in the summing-up upon which the appeal is based is as follows: "When he is arrested on the 27th by Detective-Inspector Withers, he is told he answers the description of one of two men who are wanted for stealing this money. He was cautioned and he made no reply. I only want to say this about that: Of course, a man is not obliged to say anything at all, he need not say anything; sometimes it is of great assistance to him if he does, if he at the first moment gives his explanation". The learned Recorder then went into an

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interesting historical disquisition as to the form of the caution as it was administered some years ago, and as it had been altered in fact by the Criminal Justice Act, 1925, and, after that, he continued: "However that may be, this accused man, neither then nor later when he was charged, made any suggestion that there had been a mistake about him. He had nothing to say—'I am saying nothing'. What he told you in the witness-box to-day was a slight variation of that; I do not think there is very much in it, but not a word upon the lines that he has now put forward in his defence, namely, that he was not the man who was there, knew nothing about this and took no part in it; he was at Piccadilly, at a news reel film on the 23rd, and so on—not a word".

Now that cannot be considered a satisfactory summing-up of the evidence. It was inaccurate in fact. If the jury accepted the appellant's evidence, and it was uncontradicted, he had from the first denied that he was the guilty man, and the jury ought not to have been told that the accused—in the words of the learned Recorder—had not said "a word upon the lines that he has now put forward in his defence, namely, that he was not the man who was there". But a more serious allegation is that this part of the summing-up offends against the rule so often laid down by this Court, and most recently in LECKEY, 29 Cr. App. R. 128; [1944] 1 K. B. 80, which is accurately quoted in the grounds of appeal. In delivering the judgment of the Court in LECKEY, 29 Cr. App. R., at p. 133; [1944] 1 K. B., at p. 85, Viscount Caldecote, L.C.J., quoted with approval and adopted the language of Lord Hewart, C.J., in NAYLOR, 23 Cr. App. R., at p. 180; [1933] 1 K. B. 685, at p. 687, as follows: "When one looks at the words of the caution in the Criminal Justice Act, 1925, s. 12 (2), which must be taken to have been framed deliberately, it is obvious that they were intended to convey to the prisoner the information that he is not obliged to say anything unless he desires to do so. We do not think that the words of the caution can properly be construed in the sense that the

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prisoner remains silent after being cautioned at his peril and may find his silence made a strong point against him at his trial. In our view, the words mean what they say, and a prisoner is entitled to reply to the caution that he does not wish to say anything". Viscount Caldecote, L.C.J., himself put the matter in this way, after referring to the passages complained of in the summing-up in that case: "We think that that amounted to a misdirection, and it is proper ground upon which this verdict, subject to one other question, should be quashed. If it were not so, it must be obvious that a caution may be indeed a trap instead of being a means for finding out the truth, in the interests as much of innocent persons as it is in the interests of justice against guilty persons. An innocent person might well, either from excessive caution or for some other reason, decline to say anything when charged and cautioned, and if it was possible to hold that out to a jury as ground upon which they might find a man guilty, it is obvious that innocent persons might be in great peril. However that may be, the law seems to us clear, and to have been clearly laid down by this Court on more than one occasion, particularly in NAYLOR (*supra*) to which I have referred".

We came to the conclusion that the summing-up in this case did offend against the rule, and that it would be our duty to allow the appeal and quash the conviction, unless the proviso to section 4 of the Criminal Appeal Act, 1907, applied. Now section 4 is the section in which are to be found the grounds upon which the Court of Criminal Appeal are to allow an appeal, and there are two of those grounds in particular to which the proviso applies. It will be sufficient to refer to those two grounds. One is that the Court of Criminal Appeal, on any such appeal against conviction, shall allow the appeal if they think that the judgment of the Court before whom the appellant was convicted should be set aside, on the ground of a wrong decision of any question of law—that does not apply to this case—or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal. The

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proviso runs as follows: "Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred". The two key words, if I may use the expression, in that sentence, seem to be the word "substantial" as a description of the miscarriage of justice, and the word "actually". They may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

Mr. Maude, who appeared for the appellant, argued that we could not give effect to the proviso in this case unless the Court was prepared to hold that no jury properly directed *could* have acquitted the appellant. He based that argument upon a passage in the opinion of Lord Sankey, L.C., in giving his opinion in the House of Lords in WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 25 Cr. App. R. 72, at p. 92; [1935] A. C. 462, at p. 482; it is the very last effective sentence of his judgment. His Lordship observed as follows, after reading the proviso to section 4, which I have just read: "The Act makes no distinction between a capital case"—that was a capital case—"and any other case, but we think it impossible to apply it in the present case. We cannot say that if the jury had been properly directed they would have inevitably come to the same conclusion". It is the word "inevitably" in that sentence upon which Mr. Maude relied.

In our opinion, it would be wrong to give effect to that argument. To accept it would be to render the proviso practically otiose, for it can never be said with certainty in any criminal case, however strong the evidence for the prosecution, that no jury could be found to acquit. The Lord Chancellor, we are satisfied, was not referring to a jury who might return a perverse verdict but to a jury of sensible persons anxious to do their duty which is, in the language of the juror's oath, to return a true verdict according to the evidence. Now, if that be the correct view, the word "inevitably" becomes merely

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an adverb of emphasis designed to express the necessity for the absence of any doubt on the part of the Court that a reasonable jury properly directed would have returned the same verdict. In the very early days of this Court, Lord Alverstone, C.J., in DYSON (1908), 1 Cr. App. R. 15, used the phrase in delivering the judgment of the Court: "We cannot in this case say that if they had been properly directed the jury must have come to the conclusion which would have supported the conviction". In a later case in 1909, STODDART, his Lordship observed as follows ((1909) 2 Cr. App. R. 217, at p. 245): "We think it is open to consideration whether the word 'must' is not too strong, and whether the proper question is not, whether if properly directed the jury would have returned the same verdict".

Now it seems to us to matter very little what precise words are used so long as the language of the proviso is satisfied and the Court is sure that there has been no substantial miscarriage of justice. The proper interpretation of the expression "substantial miscarriage of justice" occurring in the proviso was the subject of a considered judgment of this Court in COHEN AND BATEMAN (1909), 2 Cr. App. R. 197. At p. 207 I find these words of Channell, J., who delivered the judgment of the Court, the other members of the Court being Jelf and Bray, JJ.: "We have had an opportunity of carefully discussing this case, and we have arrived at our conclusion. Under the statute only one judgment is delivered, and we have, therefore, put into writing our judgment upon the construction of section 4 (1) of the Criminal Appeal Act". Then the learned Judge reads the section itself and discusses it, and deals first with the ground of appeal that the conviction should be set aside on the ground of a wrong decision of any question of law. His Lordship then proceeds as follows: "A mistake of the Judge as to fact, or an omission to refer to some point in favour of the prisoner, is not, however, a wrong decision of a point of law, but merely comes within the very wide words 'any other ground', so that the appeal should be

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allowed according as there is or is not a 'miscarriage of justice'. There is such a miscarriage of justice not only where the Court comes to the conclusion that the verdict of guilty was wrong, but also when it is of opinion that the mistake of fact or omission on the part of the Judge may reasonably be considered to have brought about that verdict, and when, on the whole facts and with a correct direction, the jury might fairly and reasonably have found the appellant not guilty. Then there has been not only a miscarriage of justice but a substantial one, because the appellant has lost the chance which was fairly open to him of being acquitted, and therefore, as there is no power of this Court to grant a new trial, the conviction has to be quashed. If, however, the Court in such a case comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice, or at all events no substantial miscarriage of justice within the meaning of the proviso". That statement of the law has stood for thirty-five years and, so far as we are aware, has never been the subject of adverse comment, though Judges in giving the decisions of the Court of Criminal Appeal have used varying language and many different expressions, including the word "inevitably", which does not occur for the first time in the opinion of Lord Sankey, L.C., in WOOLMINGTON (*supra*). We are convinced that it was not the intention of the Lord Chancellor in that case, or of the other members of their Lordships' House who concurred in his opinion, to lay down any different interpretation of the expression "miscarriage of justice".

We have considered the facts of this case and the evidence given at the trial. In our opinion, the evidence for the prosecution was overwhelming. On August 27 three separate persons picked out without hesitation the appellant as one of the persons who had been in their company for over an hour four days earlier. The summing-up was careful and accurate, apart from the one passage complained of. The case of LECKEY

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(*supra*) in which the Court declined to apply the proviso, and which in fact was a capital case, was a very different case. As the Lord Chief Justice (Viscount Caldecote) observed, on three different occasions, once at the beginning, once a little later on and a third time just before the end of his summing-up, the learned Judge seemed to put to the jury the consideration that they might infer the guilt of the accused by considering the fact of his silence after caution. In fact, his silence was made a feature of the case against him. In this case we are satisfied that no reasonable jury properly directed throughout would, or could, have come to any other conclusion, and that no miscarriage of justice has actually occurred. We accordingly dismiss the appeal, but as leave to appeal was granted, the time during which Haddy has been treated as an appellant will count towards his sentence.

Appeal dismissed.

Solicitors: Smithdale, Rutledge & Co., for appellant; Solicitor to Metropolitan Police, for the Crown.

BEFORE

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JOHN ABRAHAM LINCOLN.

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Summing-up—Charges of Larceny and Receiving—Jury Told to Regard Case as one of Larceny—Acquittal of Larceny and Conviction of Receiving—Verdict Accepted by Judge—Conviction Quashed.

An indictment contained several counts for larceny with alternative counts for receiving the property knowing it to have been stolen. The case was treated from the outset as one of larceny; the prisoner's evidence dealt with the question of

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larceny only; and the Judge, in his summing-up, directed the jury on the issue of larceny only. The jury, however, acquitted on all counts for larceny but convicted on one count for receiving, and the Judge accepted the verdict on the ground that there was evidence to support it.

Held, that assuming that there was evidence of receiving, inasmuch as the defence had never been heard on the issue, and had had no opportunity of dealing with it, the trial was so unsatisfactory that the conviction must be quashed.

It is the duty of the Judge to leave to the jury every count in the indictment on which there is sufficient evidence to go to them, and to direct the jury on the law relating to each count which is left to them.

Appeal against conviction (on certificate).

The appellant was convicted at the County of London Sessions on December 15, 1943 of receiving stolen property and was sentenced by the Chairman to nine months' imprisonment.

The indictment contained several counts for larceny, and in each case an alternative count for receiving the property knowing it to have been stolen. From the outset the case was treated as one of larceny only; the appellant directed his evidence to the issue of larceny only; and the Judge, in his summing-up, directed the jury on larceny only and gave no direction on receiving. The jury returned a verdict of not guilty on all the counts for larceny, and were then invited to return a formal verdict of not guilty of receiving, but insisted on convicting on one of these counts. The Chairman accepted that verdict, on the ground that there was evidence to support it, but gave a certificate under section 3 (*b*) of the Criminal Appeal Act, 1907.

Alban Gordon, for the appellant:

The Judge was wrong in accepting the verdict of guilty of receiving, when the whole case from the outset had been fought on the basis that it was larceny or nothing, and when the Judge himself in his summing-up had directed the jury only on the issue of larceny. Even if it be assumed that the Judge was right in holding that there was some evidence of

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receiving, the defence had never directed their attention to or been heard on that issue.

Frederick Levy, for the Crown:

Except for the fact that in the opening speech for the prosecution the counts relating to receiving were mentioned, though in no way emphasised, it is conceded that the issue throughout the trial was confined to larceny, and in the circumstances the conviction on one count for receiving cannot be regarded as entirely satisfactory.

HUMPHREYS, J.: In this case the appellant was charged at the County of London Sessions on an indictment which contained three separate allegations with regard to three separate matters. In each of those it was alleged that he stole something and, by way of alternative charge, it was alleged that he received that article well knowing it to have been stolen.

The learned Chairman, who tried the case, came to the conclusion that the evidence in all three cases pointed to the crime of larceny rather than to the crime of receiving goods knowing them to have been stolen. The jury acquitted altogether, both of stealing and receiving, in two of the cases. In the third case, with which alone we are concerned, the learned Chairman summed up to the jury on the issue of stealing. The jury, having been told, after they had returned a verdict of not guilty of stealing, that they should return a formal verdict of not guilty on the counts for receiving, said: "Oh, no, that is not our view at all", and this is what then took place: "(The Chairman) . . . Will you just formally return a verdict on those receiving counts of not guilty? Members of the jury, what is it you want to say. I want to follow. (The Foreman): Well, on one of the counts the jury consider he is guilty. (The Chairman): Which one is that? (The Foreman): That is the question of the calculator"—that was a thing which was alleged to have been stolen and to have been received—"(The Chairman): Yes, I quite follow. You find him not guilty on all the other counts. You find him not guilty of

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stealing the calculator. (The Foreman): Guilty of receiving it knowing it to have been stolen. (The Chairman): Well, there is evidence. All right, members of the jury, if you prefer it that way". Then the verdict was formally taken in that form and the foreman said: "That is the verdict of us all". Then Mr. Gordon, who appeared for the appellant, said: "I should have submitted, without your Lordship's direction, that that was not open to the jury. (The Chairman): Why not? There is plenty of evidence of receiving. There are alternative counts. (Mr. Gordon): The whole case has been fought on the basis of the stealing. Your Lordship intimated it to the jury in your Lordship's summing-up. (The Chairman): I told the jury it would be better to direct their attention to the stealing counts, but they are perfectly entitled to do what they have done. You had better go to the Court of Criminal Appeal, if you think I am wrong". Mr. Gordon has come here, and our view is that there is only one thing that we can do in this case, and that is to quash the conviction on this ground, that upon the charge of receiving stolen property, assuming for the purpose of argument only that there was evidence upon which the jury could properly find that verdict, the defence have never been heard. The defence have never dealt with that accusation, because everybody was told at the commencement of the case that it was to be tried as a case of stealing or nothing. The appellant has not had an opportunity of giving evidence upon the question of receiving, and counsel has had no opportunity of addressing the jury upon it. Moreover there was no direction to the jury upon the law relating to receiving.

The issues upon a charge of receiving property knowing it to have been stolen are quite different from the issues which have to be considered on a charge of stealing. Therefore, upon that ground our decision must be in accord with previous decisions in this Court that the verdict cannot stand on the ground that the whole proceedings were unsatisfactory. What the learned Chairman was doing from the outset in this case

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was to usurp the functions of the jury. It is not the business of the trial Judge to decide which of two alternative verdicts is the more appropriate in a case. His duty is to leave to the jury everything in the indictment upon which there is evidence to go to the jury. He may, of course, point out to the jury what is his own view of the matter, but he must direct the jury upon the law relating to every count in the indictment upon which he is leaving it to them to find a verdict.

In this case, the action of the learned Chairman was tantamount to removing from the jury altogether one of the counts of the indictment while still holding the view that there was evidence on which they could convict upon it. The whole trial, from that point of view, was so unsatisfactory that we feel the only course we can take is to say that this appeal must be allowed and the conviction quashed.

Conviction quashed.

Solicitors: Philip Conway, Thomas & Co., for appellant; Solicitor for Metropolitan Police, for the Crown.

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